(1) 95-590

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Petitioner,

v.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC., AND BILLY GRUBBS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment and the *Noerr-Pennington* doctrine shield from liability a party who files in good faith an administrative complaint seeking a determination from a state agency about the propriety of a proposed franchise transfer.

2. Whether the court of appeals in this diversity case erred in refusing to certify to the state supreme court dispositive state law issues that were novel and will have a dramatic impact on the state's motor vehicle dealers and franchisors.

RULE 29.6 STATEMENT

Petitioner Mercedes-Benz of North America, Inc. (Mercedes) has no subsidiaries other than wholly owned subsidiaries and has issued no publicly traded shares. Mercedes is a wholly owned subsidiary of Daimler-Benz North America Corp., which in turn is wholly owned by Daimler-Benz A.G.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mercedes-Benz of North America, Inc. (Mercedes) respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-17a) is reported at 32 F.3d 528. The district court's order granting respondents' motions for partial summary judgment (App., *infra*, 22a-31a) and final judgments (App., *infra*, 18a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1994, and a petition for rehearing was denied on July 27, 1995 (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Florida Automobile Dealer's Act (Act), Chapter 320 of Florida Statutes (1985), provides in pertinent part:

> **Section 320.641 Unfair cancellation of franchise agreements.—**
>
> (1)(a) An applicant or licensee shall give written notice to the motor vehicle dealer and the department of the licensee's intention to discontinue, cancel, or fail to renew a franchise agreement or of the licensee's intention to modify a franchise or replace a franchise with a succeeding franchise, * * * at least 90 days before the effective date thereof, together with the specific grounds for such action.
>
> * * * * *
>
> (3) A motor vehicle dealer whose franchise agreement is discontinued, canceled, not renewed, modified, or replaced may, within the 90-day notice period, file with the department a verified complaint for a determination of whether such action is an unfair or prohibited discontinuation, cancellation, nonrenewal, modification, or replacement.
>
> * * * * *
>
> **Section 320.643 Transfer, assignment, or sale of franchise agreements.—**
>
> (1) A motor vehicle dealer shall not transfer * * * a franchise agreement to another person unless the dealer first notifies the licensee of his decision to make such transfer, by written notice setting forth the prospective

transferee's name, address, financial qualification, and business experience during the previous 5 years. The licensee shall, in writing, within 60 days after receipt of such notice, inform the dealer either of his approval of the transfer, * * * or of the unacceptability of the proposed transferee, setting forth the material reasons for the rejection. If the licensee does not so inform the dealer within the 60-day period, its approval of the proposed transfer is deemed granted. * * * Notwithstanding the terms of any franchise agreement, the acceptance by the licensee of the proposed transferee shall not be unreasonably withheld. For the purposes of this section, the refusal by the licensee to accept a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards, if any, of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers is presumed to be unreasonable.

(2)(a) * * * [A] licensee shall not * * * fail or refuse to give effect to, prevent, prohibit, or penalize, * * * any motor vehicle dealer * * * from selling, assigning, transferring, alienating, or otherwise disposing of, in whole or in part, the equity interest * * * in such motor vehicle dealer to any other person or persons, * * * unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not * * * of good moral character. A motor vehicle dealer * * * who desires to sell, assign, transfer, alienate, or otherwise dispose of any interest in such motor vehicle dealer shall notify, or cause the proposed transferee to so notify, the licensee, in writing, of the identity and address of the proposed transferee. A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that

the proposed transferee is not a person qualified to be a transferee under this section. * * * The department shall determine, and enter an order providing, that the proposed transferee either is qualified or is not and cannot be qualified for specified reasons; or the order may provide the conditions under which a proposed transferee would be qualified. If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended in accordance with the determination and order rendered * * *.

* * * * *

Section 320.697 Civil damages.—

Any person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of §§ 320.60-320.70 * * * has a cause of action against the licensee for damages and may recover damages * * * in an amount equal to 3 times the pecuniary loss * * *.

STATEMENT

A. The Automobile Dealer's Act

Under the Automobile Dealer's Act, Florida law confers special rights and imposes special obligations on automobile dealers and their manufacturer-franchisors (or, as they are referred to in the Act, "licensees").[1] The statute was enacted

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[1] "Within the context of Florida's dealer protection scheme, a 'licensee' includes the manufacturers, distributors and importers that are required to be licensed by the Department [of Highway Safety and Motor Vehicles] in order to have their vehicles sold in th[e] state." *Mercedes-Benz of North Am., Inc.* v. *Mike Smith*

to "ensur[e] fair dealing between motor vehicle manufacturers, motor vehicle dealers, and motor vehicle consumers." *Dick Winning Chrysler* v. *Chrysler Motors Corp.*, 750 F.2d 895, 898 (11th Cir. 1985).

Section 320.641(a) of the Act provides that a licensee must give a dealer 90 days' notice of a proposed termination of the dealership franchise. A dealer may, within the 90-day notice period, file an administrative complaint under Section 320.641(3) of the Act with the Florida Department of Highway Safety and Motor Vehicles (DMV) challenging the termination as unfair or prohibited.

Any dealer that wishes to sell or transfer its franchise must give the licensee 60 days' notice of the proposed transfer under Section 320.643(1). The licensee may either approve the transfer or file a complaint with the DMV objecting to the transfer under Section 320.643(2)(a). If the licensee fails to file a complaint under Section 320.643(2)(a), "the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended" and the transfer is automatically authorized.

The standards for reviewing a proposed transfer are not precisely defined in the statute. Section 320.643(1) provides generally that the acceptance by a licensee of a proposed transferee must "not be unreasonably withheld." An objection to "a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards" of the licensee relating to "business experience" is "presumed to be unreasonable." *Ibid.* Such statutory presumptions are rebuttable under the Florida constitution. *Straughn* v. *K & K Land Management, Inc.*, 326 So.2d 421, 424 (Fla. 1976).

Pontiac, GMC, Inc., 561 So.2d 620, 623 n.5 (Fla. Dist. Ct. App.), rev. denied, 574 So.2d 142 (Fla. 1990). Mercedes is a "licensee." *Ibid.*

Finally, Section 320.697 authorizes a civil action by any "person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of §§ 320.60-320.70." The statute allows a prevailing plaintiff to "recover damages * * * in an amount equal to 3 times the pecuniary loss." *Ibid.*

B. Factual and Procedural Background

1. In 1983 respondent Mike Smith Pontiac, GMC, Inc. (MSP) and Mercedes entered into a franchise agreement that permitted MSP to sell and service Mercedes automobiles. Jerome Ginsburg owned 75% of MSP's stock and Mike Smith owned 25% of the stock. After a dispute between the two owners of MSP in 1985, Ginsburg ousted Smith from the dealership. In response, Mercedes invoked a provision of the franchise agreement providing for termination of the franchise in the event any disagreement between the dealer operators and owners adversely affects the dealer's business and continues for three months after Mercedes notifies the dealer that the disagreement must be resolved. App., *infra*, 5a, 23a-24a. By letter dated July 1, 1985, Mercedes notified Ginsburg and Smith that their dispute must be resolved within 90 days to avoid termination. See *Mercedes-Benz of North Am., Inc.* v. *Mike Smith Pontiac, GMC, Inc.*, 561 So.2d 620, 621 (Fla. Dist. Ct. App.), rev. denied, 574 So.2d 142 (Fla. 1990).

Smith sued MSP and Ginsburg in September 1985, alleging that he had been illegally ousted from the dealership and deprived of his 25% ownership interest in MSP. *Mercedes-Benz*, 561 So.2d at 621 n.1; D. Ex. 988.[2] On October 23, 1985, Mercedes notified MSP of its intent to terminate the franchise agreement effective January 31, 1986,

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[2] Citations to D. Ex. and P. Ex. refer to the defendant's and the plaintiffs' trial exhibits.

because of the unresolved dispute between Ginsburg and Smith. App., *infra*, 5a.

MSP in turn filed a complaint with the DMV on January 16, 1986, under Section 320.641(3) of the Automobile Dealer's Act, alleging unfair termination of the dealership by Mercedes. *Mercedes-Benz*, 561 So.2d at 621. Before the final hearing on MSP's complaint,[3] MSP proposed a transfer of the franchise to Ronald Cutler and forwarded a sales agreement between it and Cutler to Mercedes for its consideration. App., *infra*, 5a, 24a; R. 29-192.[4] Mercedes objected to the proposed transfer on several grounds, most notably because Smith — who continued to claim a 25% ownership interest in MSP — had not executed the sales agreement, which did not provide for any payment to him for his interest in MSP, and he threatened to sue Mercedes if it approved the proposed transfer. D. Ex. 811; R. 35-103 to 35-106.

As a result of its concerns about the proposed transfer, Mercedes filed its own administrative complaint with the DMV on December 15, 1986, under Section 320.643(2)(a), challenging the transfer to Cutler. While this challenge to the Cutler transfer was pending,[5] the hearing officer presiding over MSP's objection to the termination of its franchise concluded on May 1, 1987 that the termination by Mercedes

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[3] Because MSP's complaint was "filed within the ninety day notice period," its Mercedes dealership agreement "continued in effect by operation of section 320.641(3), Florida Statutes (1985), until the termination dispute was resolved." *Mercedes-Benz*, 561 So.2d at 621-622 (footnote omitted).

[4] Citations in this form refer to the trial transcript.

[5] The hearing officer presiding over the Cutler transfer challenge stayed those proceedings pending entry of a final order in the MSP termination case. *Mercedes-Benz*, 561 So.2d at 622.

was proper. App., *infra*, 6a, 25a; *Mercedes-Benz*, 561 So.2d at 622.

Before the DMV acted on the hearing officer's determination that the termination of MSP was proper, MSP and Cutler modified their proposed transaction to meet the objections of Mercedes. *Ibid.*; App., *infra*, 25a. Among other things, Cutler agreed to indemnify Mercedes against any future liability to Smith, who continued to object to the transfer. R. 29-197. Mercedes approved the transfer as modified and executed a franchise agreement with Cutler. MSP then terminated its manager and gave control of the dealership to Cutler while Mercedes awaited confirmation of the closing of the transaction between MSP and Cutler. R. 29-298 to 29-299, 33-41, 33-61; D. Ex. 494. In the interim, Mercedes notified the DMV on May 19, 1987 that it had approved the transfer to Cutler and thereby rendered the termination action moot. App., *infra*, 6a, 25a; P. Ex. 210.

The following month, before final action was taken in either of the pending DMV administrative actions (the MSP termination proceeding or the Cutler transfer proceeding), MSP notified Mercedes that it was revoking the transfer to Cutler. Instead, MSP sought Mercedes' review of a proposed transfer of the dealership to yet another group, respondents Terry Taylor, Billy Grubbs, and Terry Taylor Investments, Inc. (collectively Taylor). App., *infra*, 6a, 25a.

Cutler immediately filed a request in the Cutler transfer proceeding before the DMV for an injunction prohibiting Mercedes from approving any other proposed transaction on the grounds that MSP had breached its agreement with Cutler. R. 34-106. Cutler also brought a state court action against MSP and Ginsburg seeking specific performance of their agreement to sell the Mercedes dealership to him and damages for tortious interference with Cutler's relationship with Mercedes. R. 29-201 to 29-202; D. Ex. 364.

On August 28, 1987, 60 days after receiving notice of MSP's proposed transfer to Taylor, Mercedes filed a complaint with the DMV challenging the Taylor transfer.[6] App., *infra*, 6a, 25a. Mercedes objected to the transfer "on the ground that by approving the transfer it would open itself up to potential lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer." App., *infra*, 6a. To resolve this complicated ownership dispute, Mercedes joined Smith and Cutler as parties to the proceedings — in addition to MSP and Taylor — so that all interested parties could be heard in one forum. P. Ex. 93; R. 29-203, 29-208.

The DMV on November 9, 1987, granted MSP's motion to dismiss Mercedes' complaint on the ground that it failed to challenge the qualifications of Taylor, the proposed transferee. App., *infra*, 6a. As a result, with no complaint interposed under Section 320.643(2)(a), the transfer of the dealership from MSP to Taylor "took place by operation of law." *Mercedes-Benz*, 561 So.2d at 624.[7]

On appeal, the Florida District Court of Appeal held that "[t]he transfer challenge envisioned in this section [320.643(2)(a)] must allege that the proposed transferee is not qualified under the terms of the statute." *Mercedes-Benz*, 561 So.2d at 624. The court noted that Section 320.643 mentions only moral character and business experience as "qualifications." *Ibid.* Because Mercedes' complaint did not challenge Taylor's qualifications on these grounds, and instead focused on its inability to reconcile the conflicting

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[6] Had Mercedes not filed a complaint by the 60th day after receiving notice, the transfer from MSP to Taylor would have automatically been consummated by operation of Section 320.643(2)(a).

[7] The Department dismissed as moot the prior administrative action brought by MSP to challenge the termination notification by Mercedes. 561 So.2d at 624.

claims to the franchise by Smith and Cutler, the court affirmed the dismissal of the complaint.[8] *Ibid.* The Florida Supreme Court denied review. 574 So.2d 142 (1990).

2. MSP thereafter brought this diversity action against Mercedes in federal district court. Among other claims for relief,[9] MSP sought treble damages under Section 320.697 of the Automobile Dealer's Act because Mercedes had allegedly "violated" Section 320.643 by filing a complaint with the DMV asking for a determination whether the proposed transfer from MSP to Taylor was proper under Florida law in light of the conflicting claims of Smith, Cutler, and Taylor. Mercedes answered and asserted, among other defenses, that a construction of the Automobile Dealer's Act to impose damages on Mercedes for petitioning for administrative relief from the DMV would violate the First Amendment to the U.S. Constitution. R. 1-8.

Mercedes also counterclaimed against MSP, and added Taylor as a party, seeking a declaration as to whether MSP or Taylor was Mercedes' authorized dealer. R. 1-8. Taylor asserted a counterclaim against Mercedes seeking treble damages under Section 320.697 of the Automobile Dealer's Act on the same grounds as MSP's claim under the statute. R. 2-20. Mercedes interposed its First Amendment defense and also challenged Taylor's standing to bring an action under Section 320.697.

On motions for partial summary judgment by MSP and Taylor, the district court held that the DMV's dismissal of

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[8] The court cited no precedents for its interpretation of the statute and expressly noted that other grounds for a challenge to a transferee, such as financial qualifications, may be permissible. 561 So.2d at 624.

[9] MSP also sought damages for breach of contract and tortious interference with contract. R. 1-1.

Mercedes' complaint challenging the Taylor transfer amounted to a "determination that Mercedes violated section 320.643 [and] is *res judicata*" on the issue. App., *infra*, 31a. The district court also held that Mercedes' First Amendment claim was no defense to liability under Section 320.643. R. 29-405, R. 31-214. The court instructed the jury to assess damages against Mercedes for the violation of this section, but allowed the jury to consider Mercedes' First Amendment right to petition the DMV in deciding whether to impose treble damages. R. 15-248-21, 22. The jury awarded damages of $2.5 million to MSP and $2.8 million to Taylor under Section 320.697, but declined to treble the amounts.[10] App., *infra*, 18a, 20a. Both sides appealed.

C. The Eleventh Circuit's Decision

Mercedes pressed its First Amendment defense in the court of appeals, invoking this Court's *Noerr-Pennington* doctrine. See *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastman R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Mercedes also challenged the district court's holding that *res judicata* precluded litigation of the question whether Mercedes had violated Section 320.643 and renewed its challenge to Taylor's standing as a prospective franchisee to bring an action under Section 320.697. Respondents appealed the district court's decision that Section 320.697 does not mandate treble damages.

Over a strong dissent, the court of appeals affirmed the district court's liability holding. As a preliminary matter, the court refused even to consider Mercedes' First Amendment defense — not even mentioning that the issue had been

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[10] As directed by the trial judge, the jury calculated respondents' compensatory damages. The jury found for Mercedes on all of the other liability issues that were submitted to it. App., *infra*, 18a-21a.

decided by the district court and extensively briefed and argued by the parties on appeal. The court of appeals proceeded to hold that Taylor had standing as a "potential franchisee" to bring an action under Section 320.697 because the statute authorizes suits by "[a]ny person who has suffered pecuniary loss" as a result of a violation of the Automobile Dealer's Act by a licensee. App., *infra*, 7a-8a. The court also affirmed the holding of the district court that Mercedes "violated" Section 320.643 and that the issue was *res judicata*. App., *infra*, 8a-12a. Finally, the court of appeals reversed the holding of the district court that treble damages are not mandated by Section 320.697. The court remanded the case to the district court "for a determination of appropriate damages." App., *infra*, 13a-15a.

Judge Hill dissented on the grounds that the important issues of Florida law decided by the court — whether a prospective franchisee has standing under Section 320.697, whether a licensee "violates" Section 320.643 by filing a complaint opposing a transfer on grounds other than the transferee's business qualifications and moral character, and whether treble damages are mandatory under the statute — should be certified to the Florida Supreme Court. The dissent questioned the correctness of the court of appeals' holding on these state law issues and observed that none of the issues had been addressed by the Florida courts. App., *infra*, 16a-17a.

REASONS FOR GRANTING THE PETITION

Faced with competing claims to an automobile dealership, and almost certain monetary liability if it guessed wrong, Mercedes chose — reasonably and in good faith — to seek an adjudication of its legal rights and obligations in the Florida administrative and judicial process. Rather than causing the automatic transfer of the dealership to Taylor, which might have been unlawful because of the interests of Smith and Cutler, Mercedes filed a complaint with the Florida DMV to resolve the ownership dispute and joined all of the claimants as parties. Because of this action, a divided panel of the

Eleventh Circuit has held that Mercedes is liable to respondents for more than *$15 million* in compensatory and punitive (treble) damages.

This result is incorrect, and inconsistent with the decisions of this Court and other courts, for two reasons. First, Mercedes cannot be subjected to damages liability under state law for exercising its First Amendment right to "petition the Government for a redress of grievances." Second, as Judge Hill explained in dissent, the panel erred in construing the Automobile Dealer's Act to impose massive and unforeseen monetary liability, rather than "us[ing the] valuable mechanism" of certifying these "important, heretofore undecided, questions of Florida law" to the Florida Supreme Court. App. *infra*, 16a-17a. Further review is plainly warranted.

I. THE COURT OF APPEALS' REJECTION OF PETITIONER'S FIRST AMENDMENT DEFENSE IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND CONFLICTS WITH OTHER CIRCUITS ON THE PROPER APPLICATION OF THE *NOERR-PENNINGTON* DOCTRINE

The court of appeals' rejection without analysis of Mercedes' First Amendment defense to liability under Section 320.697 of the Automobile Dealer's Act cannot be reconciled with this Court's long-standing precedents under the *Noerr-Pennington* doctrine and creates a circuit conflict over the proper application of that doctrine outside the antitrust context. Review by this Court is necessary to resolve that conflict and to address this important issue of constitutional law.

A. The First Amendment protects a person's right "to petition the Government for a redress of grievances." As articulated in this Court's decisions in *Noerr*, 365 U.S. at 136, *Pennington*, 381 U.S. at 669, and their progeny, the First Amendment shields from liability those who petition the

administrative, legislative, or judicial branches of government to influence "the passage or enforcement of laws." *Noerr*, 365 U.S. at 137; see *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-513 (1972) ("the right to petition extends to all departments of the Government").

In this case, Mercedes petitioned a state administrative agency, the Florida DMV, for a determination whether Taylor was a proper transferee under Florida law in light of the conflicting ownership claims by MSP, Smith, Cutler, and Taylor. At the time Mercedes filed its complaint: (1) a final order in the MSP termination proceeding had not yet been entered by the DMV; (2) Smith and Cutler each claimed to have rights to the dealership sought to be transferred by MSP; (3) Smith and Cutler each had objected to the proposed transfer to Taylor; (4) Smith's lawsuit against MSP and Ginsburg seeking a determination of his ownership rights was unresolved; (5) Cutler's lawsuit against MSP and Ginsburg for specific performance of the sales agreement for the dealership was unresolved; and (6) Cutler's motion before the DMV to enjoin Mercedes from approving any other transfer was pending. See pages 6-8, *supra*.

Had Mercedes not filed its complaint for a determination of the lawfulness of the transfer to Taylor, the transfer would have been effected automatically by operation of Section 320.643(2)(a), thereby subjecting Mercedes to potential liability to either Smith or Cutler. As the court of appeals concluded, Mercedes objected to the transfer "on the ground that by approving the transfer it would open itself up to potential lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer." App., *infra*, 6a; see also *Mercedes-Benz*, 621 So.2d at 624. Mercedes thus filed its administrative petition in good faith because it was unsure whether Taylor was a bona fide transferee for purposes of Section 320.643 when neither Smith nor Cutler, who claimed interests in the dealership, had consented to the transfer.

The precise situation confronting Mercedes was not specifically addressed by Section 320.643 or any other section of the Automobile Dealer's Act. Accordingly, Mercedes concluded that Florida law gave it no reasonable alternative but to file a complaint against the proposed MSP-Taylor transfer and join Smith and Cutler as parties to the proceeding so that all interested parties could assert their claims in one forum and the DMV could determine the appropriate course of action for Mercedes.

The First Amendment clearly protected Mercedes' decision to petition the Florida DMV for relief in these circumstances. This Court expressly held in *California Motor Transp.*, 404 U.S. at 510-511, that the First Amendment right recognized by the *Noerr-Pennington* doctrine allows a party to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." This right is "among the most precious of the liberties safe-guarded by the Bill of Rights." *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967).

The First Amendment right to petition government agencies for redress encompasses the institution of litigation that seriously affects substantive (and legally protected) interests of other parties. In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 742-743 (1983), for example, the Court held that the First Amendment protected the filing of a well-founded lawsuit by an employer against its employees even though the lawsuit "would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights" under the federal labor laws.

Moreover, a party need not prevail in litigation to maintain its First Amendment protection. Only "sham" litigation that is "objectively baseless" is outside the First Amendment. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1923

(1993). As this Court admonished in *Professional Real Estate Investors*, courts should not conclude that a defendant's action was unreasonable just because it lost the litigation that forms the basis for the plaintiff's suit. Rather, they must remember that "'[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.'" 113 S. Ct. at 1928 n.5 (citation omitted). Only an action that is *both* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" *and* subjectively motivated as "'an attempt to interfere *directly* with the business relationships of a competitor'" loses its First Amendment immunity. *Id.* at 1928 (quoting *Noerr*, 365 U.S. at 144).

In this case, Mercedes' complaint was not "objectively baseless." The filing of an administrative action was the only reasonable course open to Mercedes, and the Automobile Dealer's Act did not expressly preclude such a filing. To be sure, the DMV and the Florida District Court of Appeal subsequently held that the DMV had no jurisdiction to adjudicate Mercedes' action because its complaint did not challenge Taylor's moral character or business experience. See pages 9-10, *supra*. But the Florida appellate court did not cite any precedent for this holding and expressly noted that there may be other grounds for a challenge to a franchise transfer not enumerated in the statute. See 561 So.2d at 624; page 10, *supra*. Mercedes' DMV complaint was therefore not "objectively baseless" when it was filed.

In any event, as the court of appeals expressly found, Mercedes certainly had no subjective intent to interfere with respondents' business relationships by bringing an administrative proceeding before the DMV. Mercedes filed its complaint only to protect itself from "lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer." App., *infra*, 6a; see also *Mercedes-Benz*, 621 So.2d at 624. Mercedes' administrative litigation was thus instituted

entirely in good faith (hence the jury's decision not to award treble damages in this case), and respondents have offered no proof to the contrary.[11]

In sum, Mercedes' conduct was at the core of the First Amendment right protected by the *Noerr-Pennington* doctrine: petitioning an administrative agency for an interpretation and enforcement of the law. This activity — the good faith filing of a DMV complaint seeking administrative action — was the sole basis for Mercedes' liability under Section 320.697 in this case.[12] The Eleventh Circuit's refusal to address this important issue and protect fundamental First Amendment rights is contrary to this Court's binding precedents and merits plenary review.

B. The court of appeals brushed aside Mercedes' First Amendment claim in response to an argument by MSP that the *Noerr-Pennington* doctrine is inapplicable to this case because it "applies only to litigation involving business relationships between competitors and anti-competitive activities covered under state and federal statutes." Answer and Reply Brief of the Appellant, Mike Smith Pontiac, GMC, Inc. 25-26. This assertion is inconsistent with decisions both

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[11] Respondents have the burden of proving that Mercedes' administrative action was a "sham." *Professional Real Estate Investors*, 113 S. Ct. at 1928.

[12] The Eleventh Circuit relied on the decision by the DMV, and its affirmance on appeal, in holding that the issue whether Mercedes had "violated" Section 320.643 by filing a complaint was *res judicata*. App., *infra*, 9a-12a. Thus, the filing and dismissal of Mercedes' complaint was the sole basis for the court's liability determination. Of course, neither the DMV nor the Florida District Court of Appeal had jurisdiction (or even the opportunity) to adjudicate Mercedes' First Amendment defense to the damages claim under Section 320.697 brought by respondents in this case.

of this Court and many lower courts on the appropriate scope of *Noerr-Pennington* immunity.

Although the *Noerr-Pennington* doctrine first arose in the antitrust context, this Court has applied the First Amendment principle underlying the doctrine in various other contexts. See *Bill Johnson's Restaurants*, 461 U.S. at 741-743 (labor law); see generally *Professional Real Estate Investors*, 113 S. Ct at 1927 (collecting cases). And many lower courts have expanded the *Noerr-Pennington* doctrine beyond the field of antitrust "to protect first amendment petitioning of the government from claims brought under federal and state laws * * *." *Video Intern'l Production, Inc.* v. *Warner-Amex Cable Comm'n, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) (citing *Evers* v. *County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984), and *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980)), cert. denied, 491 U.S. 906 (1989).[13]

The court in *Webb* v. *Fury*, 282 S.E.2d 28, 37 (W.Va. 1981), described the *Noerr-Pennington* doctrine as "a principle of constitutional law which bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs." In *Webb*, the court held that allegedly libelous statements in filings with the U.S. Department of the Interior and the U.S. Environmental Protection Agency could not, under the *Noerr-Pennington*

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[13] "In numerous cases, the courts have rejected claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action." *Brownsville Golden Age Nursing Home, Inc.* v. *Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (citing cases); see, *e.g.*, *Havoco of Am., Ltd.* v. *Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983) (defendants prompted SEC investigation); *Suburban Restoration Co.* v. *ACMAT Corp.*, 700 F.2d 98, 102 (2d Cir. 1983) (defendant sought injunction against award of public contract).

doctrine, be the basis for a subsequent damages action. 282 S.E.2d at 37-39.

Some courts, however, have resisted extending the *Noerr-Pennington* doctrine that broadly. For example, a panel of the Eighth Circuit in *In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1312 (1985), rev'd in part, 797 F.2d 632 (8th Cir. 1986) (en banc), specifically rejected the *Webb* court's formulation as overstating "the reach of the *Noerr-Pennington* doctrine." The court concluded that the doctrine had been expanded beyond the antitrust context only "to a limited extent,"[14] and did not shield defamatory statements "made in the course of petitioning the government." 755 F.2d at 1312-1313. On review en banc, the Eight Circuit reversed and held that the *Noerr-Pennington* doctrine may apply to defamation actions. 797 F.2d at 640. The Eighth Circuit subsequently noted that "the Supreme Court has never decided whether the *Noerr-Pennington* doctrine is applicable outside the antitrust area." *Hufsmith* v. *Weaver*, 817 F.2d 455, 458 (1987); cf. *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 470-471 (7th Cir. 1982) (casting doubt on "decisions stat[ing] that the right to bring lawsuits, even of a purely commercial character, is protected by the First Amendment, as a form either of petition for redress of grievances, * * * or of speech"), cert. denied, 461 U.S. 958 (1983).

In *Whelan* v. *Abell*, 827 F. Supp. 801, 802-803 (D.D.C. 1993), rev'd, 48 F.3d 1247 (D.C. Cir. 1995), the district court granted judgment as a matter of law to defendants who had filed a state administrative complaint and a lawsuit based on, among other claims, an alleged violation of state franchise law and who were subsequently sued for tortious interference

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[14] The court cited as examples actions for "tortious interference with business" and for "alleged conspiracies under 42 U.S.C. § 1983, * * * and 42 U.S.C. § 1985." 755 F.2d at 1312-1313.

with prospective business advantage by the plaintiffs who were the subjects of the complaints. The court held that the defendants were immune from liability under the *Noerr-Pennington* doctrine, stating that "a person cannot be held liable as a result of his or her filing a good faith lawsuit or administrative claim or otherwise seeking governmental redress." *Id.* at 803.

On appeal, the D.C. Circuit reversed. The court noted the tension in the case law over the scope of the *Noerr-Pennington* doctrine outside the antitrust context, but declined to "set forth any kind of encyclopedic position on the relation between the common law torts at issue here and the *Noerr-Pennington* doctrine — or between them and the First Amendment regardless of the idiosyncracies of *Noerr-Pennington*." 48 F.3d at 1253-1254. Instead, the court simply assumed that even if the *Noerr-Pennington* doctrine applied to the torts alleged by the plaintiffs, the immunity would not extend so far as to protect the complaints filed by the defendants, which the plaintiffs alleged were "deliberately false." *Id.* at 1254.

The Eleventh Circuit's decision in this case compounds the confusion in the case law by going far beyond existing precedents and completely rejecting application of the *Noerr-Pennington* doctrine — notwithstanding the fact that this Court has clearly extended the reach of *Noerr-Pennington* immunity beyond the antitrust context to protect from liability defendants who file administrative petitions like the DMV complaint submitted by Mercedes.

The conflict in the lower courts on this issue compellingly indicates the need for this Court to address the reach of the *Noerr-Pennington* doctrine. As the Third Circuit recently observed in *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 435-443 (1994), cert. denied, 115 S. Ct. 735 (1995), this Court "has not discussed the scope of the constitutional right to petition in the context of an allegedly retaliatory discharge of a public employee." This case presents the

Court with an opportunity to address the scope of *Noerr-Pennington* immunity and resolve the split among the lower courts on this issue, which has been exacerbated by the refusal of the Eleventh Circuit to recognize Mercedes' First Amendment defense in this case.

II. THE COURT OF APPEALS ERRED IN FAILING TO CERTIFY TO THE FLORIDA SUPREME COURT THE NOVEL STATE LAW QUESTIONS RAISED UNDER THE AUTOMOBILE DEALER'S ACT

In imposing treble damages liability on Mercedes, the court of appeals resolved three important and undecided questions of Florida law: whether Taylor as a prospective franchisee had standing under the Florida Automobile Dealer's Act; whether Mercedes "violated" Section 320.643 by filing a complaint under the Act; and whether treble damages are mandated by the Act. As the dissent by Judge Hill admonished, however, these novel and important questions could have and should have been certified to the Florida Supreme Court.[15] App., *infra*, 16a-17a. The Eleventh Circuit's erroneous refusal to certify these dispositive state law issues to the state supreme court is contrary to this Court's precedents and the practice established in other circuits. This serious error by the court of appeals warrants review by this Court.

In fact, this Court has enthusiastically endorsed the use of state certification procedures. In *Lehman Bros.* v. *Schein*, 416 U.S. 386, 390-391 (1974), for example, the Court found certification to be "particularly appropriate" for state law questions that are "novel[]" and "unsettle[d]." Accordingly, the Court vacated a decision of the court of appeals that had declined to certify certain dispositive state law questions to the Florida Supreme Court. The Court's decision in *Lehman*

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[15] See Fla. R. App. P. 9.030(a)(2)(C), 9.15(a).

Bros. "is a clear direction to the courts of appeals to look favorably on the use of certification procedures in diversity cases." 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[5] at 2159 (2d ed. 1995).

The benefits of state law certification are well documented. "[A]n adequate certification procedure 'does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism,'" (*Bellotti* v. *Baird*, 428 U.S. 132, 150-151 (1976), quoting *Lehman Bros.*, 416 U.S. at 391)). And this Court has repeatedly emphasized the important federalism and efficiency considerations that underlie certification:

> In a federal system, it is obviously desirable that questions of law which * * * are both intensely local and immensely important * * * be decided in the first instance by state courts. This may not always be possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it.

Elkins v. *Moreno*, 435 U.S. 647, 663 n.16 (1978). See also Note, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421, 434 (1989) ("[w]hen a court fails to avail itself of the process of certification, the resulting burden may include unsettled areas of law, inconsistent holdings [by state and federal courts] and a return to the pre-*Erie* days of forum-shopping").

In light of the salutary effects of certification, this Court has often vacated and remanded decisions for certification of state law issues or certified the questions itself *sua sponte*. See, *e.g.*, *Virginia* v. *American Booksellers Assoc.*, 484 U.S. 383, 393 (1988) (Court orders certification to state supreme court); *Zant* v. *Stephens*, 456 U.S. 410 (1982) (Court orders certification to state supreme court); *Bellotti*, 428 U.S. at 151

(remanding with instructions to certify); *Mills* v. *Rogers*, 457 U.S. 291, 305-306 (1982) (vacating court of appeals' decision and remanding for consideration of certification); *Massachusetts* v. *Feeney*, 429 U.S. 66 (1976) (*sua sponte* certification); *Aldrich* v. *Aldrich*, 375 U.S. 249 (1963) (*sua sponte* certification); *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (vacating and remanding for certification); cf. *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593 (1968) (action stayed pending declaratory action in state court).

Many of the courts of appeals have agreed that certification is a useful procedure for resolving significant and undecided state law questions. Certification is a "potentially enormously helpful procedure under which * * * unresolved and important questions of state law may be referred to the court best equipped to provide answers to them." *Jones v. Heckler*, 754 F.2d 519, 520 (4th Cir. 1985). Thus, "the certification procedure is a valuable device for securing prompt and authoritative resolution of unsettled questions of state law." *Kidney* v. *Kolmar Laboratories, Inc.*, 808 F.2d 955, 957 (2d Cir. 1987). By invoking certification, "'both federal and state judicial systems are the beneficiaries of a procedure rooted in cooperative federalism.' * * * [Certification is supported by] our *Erie* duty * * * [and] principles of federalism." *Boardman* v. *United Services Auto Ass'n*, 742 F.2d 847, 848 n.1, 851 (5th Cir. 1984) (citation omitted), cert. denied, 474 U.S. 980 (1985).

In the face of these precedents, and this Court's "clear direction" to the courts of appeals in *Lehman Bros.* to seek certification of dispositive and unsettled state law issues in diversity cases, the Eleventh Circuit should have certified the novel state law questions at issue in this case to the Florida Supreme Court. The court's decision not to certify is conspicuously out-of-step with the prevailing trend favoring a liberal utilization of state certification procedures. It is particularly indefensible here, because Florida in fact pioneered the procedures for certifying state law questions

and has employed them with great success. See *Clay*, 363 U.S. at 212.

As the dissent below pointedly noted, it is the Florida Supreme Court that should render "the first interpretation of the questions raised by th[e] relatively obscure and unclear statute" at issue in this case. App., *infra*, 17a. Only that court can issue a "decisive and authoritative [interpretation], one on which the people of Florida can rely." *Ibid.* In fact, powerful issues of federalism and comity are implicated by the court of appeals' failure to certify the questions. The court below has construed an "obscure and unclear" state statute to *mandate* treble damages in excess of $15 million as a sanction for a franchisor's good faith petitioning of the Florida DMV for a determination as to which of several possible transferees was entitled to its franchise. Thus, with no guidance from the Florida courts, the court of appeals has interpreted an important state statute to have dramatic consequences for the motor vehicle industry in the State — consequences that likely were *not* intended by the Florida legislature and that likely would *not* have been accepted by Florida's highest court.[16] See *id.* 16a-17a (Hill, J., dissenting).

In these circumstances, review by this Court is necessary not simply to have the Florida Supreme Court clarify the important issues of state law at issue in this case but, more significantly, to establish guidelines on the use of certification by the courts of appeals. While this Court has frequently endorsed and utilized certification procedures on an *ad hoc* basis for disputed state law questions, it has never

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[16] For example, the Florida District Court of Appeal in *Gans* v. *Miller Brewing Co.*, 560 So.2d 281, rev. denied, 574 So.2d 140 140 (Fla. 1990), reached the opposite conclusion from the Eleventh Circuit on the question whether a prospective franchisee has standing under a directly analogous statute regulating beer distributorships.

propounded standards for certification to be followed in the thousands of federal cases each year in which such disputes potentially arise. And, as the court of appeals' decision (and the dissent) in this case compellingly demonstrate, such standards are clearly needed.

Indeed, the need for guidance from this Court is made more acute by the increased use of certification expected in light of this Court's decision in *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991) (requiring de novo appellate review of district court determinations of state law); see Yonover, *A Kinder Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 316-317 (1994). The availability of certification has grown enormously in recent years; at least 38 states have now adopted certification procedures, and a uniform state law has been promulgated. See Stern, APPELLATE PRACTICE IN THE UNITED STATES 171-172 (2d ed. 1989). Certification represents an effective and efficient means for implementing the policies of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and ensuring that the decisions of the lower federal courts are in accord with applicable state law. Without clarification from this Court, however, the circuits (like the Eleventh Circuit here) will grow increasingly disparate in their use of certification.

This Court's review is thus essential to enable state certification procedures to achieve their full benefits for cooperative federalism, informed decisionmaking, and judicial efficiency. As an alternative to plenary review, the Court may wish to vacate and remand the case to the court of appeals with instructions to certify the state law issues to the Florida Supreme Court, as the dissent below strongly urged. See cases cited at pages 22-23, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1995

APPENDIX A

[Filed July 27, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-3134

MIKE SMITH PONTIAC, GMC, INC.,

Plaintiff-Counterdefendant-Appellant, Cross-Appellee,

versus

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Defendant-Counterclaimant, Counterdefendant-Appellee, Cross-Appellee, Cross-Appellant,

FEDERAL INSURANCE COMPANY,

Defendant-Counterclaimant,

TERRY TAYLOR; TERRY TAYLOR INVESTMENTS, INC.; BILLY GRUBBS,

Counterdefendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTING(S) OF REHEARING EN BANC

Before: BLACK and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-3134

MIKE SMITH PONTIAC, GMC, INC.,

Plaintiff-Counterdefendant-Appellant, Cross-Appellee,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Defendant-Counterclaimant, Counterdefendant-Appellee, Cross-Appellee, Cross-Appellant,

FEDERAL INSURANCE COMPANY,

Defendant-Counterclaimant,

TERRY TAYLOR; TERRY TAYLOR INVESTMENTS, INC.; BILLY GRUBBS,

Counterdefendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

September 21, 1994

Before BLACK and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

BARKETT, Circuit Judge:

Appellants, Cross-Appellees Mike Smith Pontiac GMC, Inc. (MSP) and Terry Taylor, Billy Grubbs and Terry Taylor Investments (collectively, Taylor) appeal the district court's summary judgment that the Florida Automobile Dealer's Act, Section 320.697, Florida Statutes (1985) does not mandate a treble damage award. Appellee, Cross-Appellant Mercedes-Benz of North America, Inc. (Mercedes-Benz) cross-appeals the district court's summary judgment that Mercedes-Benz violated § 320.643 and that § 320.697 provides standing to a prospective purchaser of an automobile dealership. We reverse the district court's decision that the award of treble damages be left to the jury's discretion. In all other respects, we affirm.

ISSUES

The complaint in this case was brought pursuant to the Florida Automobile Dealer's Act (the Act), which provides, in pertinent part, that "[a]ny person who has suffered pecuniary loss or who has been adversely affected because of a violation of §§ 320.60-320.70 ... has a cause of action ... and may recover damages ... in an amount equal to 3 times the pecuniary loss." § 320.697. There are three issues we must decide in this case. The first is whether the district court erred in holding that appellant, Taylor, has standing to bring a claim under § 320.697. The second issue is whether the district court erred in declaring that Mercedes-Benz violated § 320.643. In the event we answer the second question in the affirmative, we must decide whether the district court erred in finding that Florida Statutes § 320.697 does not mandate the trebling of damages.

FACTS

In July 1983, appellant MSP and appellee Mercedes-Benz entered into a Mercedes-Benz Passenger Car Dealer Agreement (Dealer Agreement), which permitted MSP to sell and service Mercedes-Benz automobiles. The agreement subsequently was extended to December 31, 1985. Jerome Ginsburg (Ginsburg) owned seventy-five percent of MSP's stock and Mike Smith (Smith), the dealer-operator, owned twenty-five percent. In July 1985, a dispute arose between Ginsburg and Smith prompting Ginsburg to oust Smith from the dealership with the use of undated letters of resignation previously executed by Smith. In light of this dispute, Mercedes-Benz invoked Paragraph 15D(g) of the Dealer Agreement, which allows for termination due to any disagreements between the dealer operators and owners that adversely affect the dealer's business and continue for three months after Mercedes-Benz notifies the dealer that the disagreement must be resolved. On October 23, 1985, Mercedes-Benz notified MSP of its intent to terminate the Dealer Agreement because MSP had not sufficiently resolved the management dispute.[1]

Pursuant to § 320.641, MSP filed an administrative complaint with the Department of Highway Safety and Motor Vehicles (Department), claiming unfair termination of the Dealer Agreement. In October 1985, before the final hearing on the termination action, MSP proposed a transfer of the franchise to Ronald Cutler (Cutler). On December 15, 1986, pursuant to § 320.643, Mercedes-Benz filed an administrative complaint challenging the proposed transfer of the franchise to Cutler.

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[1] Section 320.641(1)(a) requires a manufacturer to give 90 days notice of its intent to cancel a dealer franchise agreement. As a result, the Dealer Agreement was extended through January 31, 1986.

On May 1, 1987, the hearing officer concluded that termination of the Dealer Agreement due to MSP's violation of Paragraph 15D(g) would be appropriate. Before the Department completed its review of the hearing officer's Recommended Order, Mercedes-Benz notified the Department that it had approved the Cutler transfer, rendering the termination action moot. However, in June 1987, MSP notified Mercedes-Benz that the Cutler transfer would not take place, and instead, MSP proposed to transfer the franchise to appellants, Taylor. The circumstances surrounding this proposed transfer form the foundation of this lawsuit.

Mercedes-Benz filed a complaint with the Department challenging the Taylor transfer on August 28, 1987. However, Mercedes-Benz' transfer challenge did not address the qualifications of the proposed transferee as mandated by the statute. Instead, Mercedes-Benz objected on the ground that by approving the transfer it would open itself up to potential lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer. Because Mercedes-Benz challenged the transfer rather than the qualifications of the transferee, MSP filed a motion to dismiss the complaint which was granted on November 9, 1987.[2]

Mercedes-Benz appealed the Department's ruling, contending, inter alia, that it properly opposed the Taylor transfer. The First District Court of Appeal affirmed the Department's order and found that amended § 320.643 applied to Mercedes-Benz, that Mercedes-Benz improperly challenged the Taylor transfer, and thus that the transfer took place by operation of law. *Mercedes-Benz of North America v. Mike Smith Pontiac GMC*, 561 So.2d 620, 625 (Fla. 1st

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[2] As a result, the Taylor transfer was effectuated by operation of law pursuant to § 320.643. At the time of dismissal, the Department dismissed MSP's unfair termination action as moot.

DCA 1990). The Florida Supreme Court denied review of the case. *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac GMC, Inc.*, 574 So.2d 142 (1990). Appellants brought this diversity action in federal court in the District of New Jersey. On Mercedes-Benz' motion, the action was transferred to the Middle District of Florida.

DISCUSSION

I. *Standing of a Prospective Franchisee*

Mercedes-Benz first contends that Taylor lacks standing to pursue a claim under § 320.697 because the statute was not intended to provide a cause of action to a prospective franchisee. Taylor rejects this interpretation and argues that a plain reading of the statute makes clear that the legislature's use of the phrase "any person" was meant to include prospective franchisees. The question of whether a prospective franchisee has standing under § 320.697 is one of first impression.

The rules of statutory construction dictate that "[w]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the statute must be given its plain and ordinary meaning." *In re McCollam*, 612 So.2d 572, 573 (Fla. 1993); *Birnholz v. 44 Wall Street Fund, Inc.*, 880 F.2d 335, 341 (11th Cir. 1989). Absent an ambiguity, the statute's plain meaning prevails. *Streeter v. Sullivan*, 509 So.2d 268, 271 (Fla. 1987); *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984). No further inquiry is required unless "an unreasonable or ridiculous conclusion would result from a failure to do so." *In Re McCollam*, 986 F.2d 436, 437 (11th Cir. 1993) (quoting *In re McCollam*, 612 So.2d at 573).

Section 320.697 provides that "[a]ny person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of §§ 320.60-320.70 ... has a cause of action against the licensee

for damages." The use of the phrase "any person" does not lend itself to ambiguity and this court finds none. The statute's plain meaning controls, and, accordingly, we find that the statute grants a potential franchisee standing to bring suit.

II. *Did Mercedes-Benz Violate § 320.643?*

We next consider whether the state proceedings established that Mercedes-Benz violated § 320.643 and whether the district court was correct in relying on these proceedings in granting partial summary judgment for MSP and Taylor on this issue.

a. *Section 320.643*

Section 320.643 provides a procedure through which a licensee may challenge a proposed transfer of an automobile dealership. Section 320.643(1) provides that within 60 days of receiving notice of a proposed transfer, a licensee "shall ... inform the dealer either of his approval of the transfer ... *or of the unacceptability of the proposed transferee*, setting forth the material reasons for the rejection." § 320.643 (emphasis added). If the licensee wishes to object, it may "within 60 days following [notice], file with the [Department] a verified complaint for a determination that the proposed transferee is not a person qualified to be a transferee under this section." Fla.Stat. § 320.643(1). An objection to a proposed transferee on grounds other than the transferee's "good moral character" or the transferee's failure to meet the licensee's "written, reasonable, and uniformly applied standards or qualifications ... relating to business experience of the [motor vehicle dealer's] executive management" is presumed to be unreasonable. *Id.*

Section 320.643(2)(a) provides that "a licensee shall not ... prevent ... any motor vehicle dealer ... from selling ... or otherwise disposing of ... the equity interest ... in such motor vehicle dealer to any other person ... unless the licensee

proves at a hearing pursuant to this section that such transfer ... is to a person who is not, or whose controlling executive management is not, of good moral character." A licensee may file with the Department a complaint for a determination "that the proposed transferee is not a person qualified to be a transferee under this section." *Id.*

b. *Collateral Estoppel*

Before we can determine whether Mercedes-Benz violated § 320.643, we must review the action of the Florida courts and decide whether they have resolved this question or any questions predicate to this determination with finality. Mercedes-Benz argues that the Florida courts have not resolved this question and that it is entitled to a de novo determination of all factual and legal issues necessary to decide this pivotal issue. MSP argues that the Florida courts have fully adjudicated this issue and that this court is precluded by principles of res judicata from readdressing it.

Collateral estoppel, or "issue preclusion," applies when a judgment "[forecloses] relitigation of a matter that has been litigated and decided." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984). "[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980); *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1501 (11th Cir. 1984). Issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal suit. *Migra*, 465 U.S. at 83, 104 S.Ct. at 897. Further, res judicata principles apply to administrative hearings. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966).

State law governs whether a state court judgment bars a subsequent federal diversity action under the doctrine of collateral estoppel. *Precision Air Parts*, 736 F.2d at 1503. The federal standard for applying collateral estoppel principles agrees with the legal standard under Florida law. *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1107 (11th Cir. 1992). This circuit has previously established three prerequisites to the application of collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action. *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985). Further, the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Precision Air Parts*, 736 F.2d at 1504. To evaluate whether collateral estoppel applies, we must first identify the issue decided in the prior litigation.

Neither state tribunal was required to determine, specifically, whether § 320.643 was violated. Instead, the state proceedings were framed to evaluate whether Mercedes-Benz met its burden under § 320.643 and *properly* withheld its consent to the Taylor transfer. Among several arguments, appellants claimed that Mercedes-Benz delayed and impeded the transfer by improperly using the statute to object because it could not object on the basis of Taylor's qualifications. On appeal, the Florida district court was briefed by the parties on the question of whether a licensee could properly object to a transfer on grounds *other* than those specified in § 320.643, namely, qualifications and character.

It is clear from the language of § 320.643 that a licensee has a right to object to a proposed transferee and, when properly asserted, the objection is free from fear of reprisal

under § 320.697. The question, however, is whether the only permissible basis for objecting and withholding approval to a proposed transferee is a transferee's qualifications and moral character. Mercedes-Benz recognizes that the express statutory refusal of a proposed franchisee under § 320.643(2)(a) is limited to specific criteria, but it argues that § 320.643(1) inferentially permits other reasons for opposing the franchisee if they are not unreasonable. Section 320.643(1) provides that "acceptance by the licensee of the proposed transferee shall not be unreasonably withheld," and that an objection to a proposed transferee on grounds other than the transferee's good moral character or qualifications is presumed to be unreasonable. Mercedes-Benz has maintained throughout the state litigation that the presumption of unreasonableness is a rebuttable one and that its opposition to the transfer for fear of being subjected to liability was appropriate rebuttal.

However, the Florida court affirmed the Department's order because: "[i]n the instant case, Mercedes-Benz' complaint was silent as to the qualifications of the Taylor Transferees.... Since this is not a proper basis for a transfer challenge, the Department correctly dismissed the complaint." *Mike Smith Pontiac*, 561 So.2d at 624. The court specifically decided that Mercedes-Benz' challenge was improper under the statute and that the only grounds for objection to a transfer are the proposed transferee's qualifications and moral character.

c. *What constitutes a violation of § 320.643?*

The question then becomes what is the legal effect of bringing an improper challenge under § 320.643. The Florida Legislature enacted the Dealer Protection Act (the Act) to ensure fair dealing at all levels among all participants in the distribution and sale of motor vehicles, and to redress the economic imbalance which naturally exists between national manufacturers and local dealers. *International*

Harvester Co. v. Calvin, 353 So.2d 144, 147 (Fla. 1st DCA 1977). The express purpose of the statute is to "protect the public health, safety, and welfare ... by regulating the licensing of ... dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as ... dealers." Fla.Stat. § 320.605. This legislation is directed toward eliminating the "harsh practices large manufacturers had inflicted upon franchisees." *Mercedes-Benz of North America, Inc. v. Department of Motor Vehicles*, 455 So.2d 404, 410 (Fla. 2d DCA 1984); *see International Harvester*, 353 So.2d at 147.

By *improperly* opposing a transfer, i.e., objecting to a proposed franchisee for reasons other than its qualifications and moral character, a manufacturer can effectuate the kinds of abuses Chapter 320 was designed to prevent. The statute was intended to facilitate the transferability of the franchise. Delaying this process and thus suspending the desired transfer can result in significant financial costs. If this conduct did not result in a violation under this admittedly complicated statutory scheme, it is difficult to imagine what type of behavior would. Accordingly, where a manufacturer opposes a transfer on grounds *not permitted* under § 320.643, that manufacturer must be deemed, under this scheme, to have violated this statute.

d. *Conclusion*

We review de novo a grant of summary judgment on grounds of collateral estoppel. *Matter of McWhorter*, 887 F.2d 1564, 1566 (11th Cir. 1989). Factual determinations underlying a district court's legal conclusions are to be upheld unless clearly erroneous. *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1244 (11th Cir. 1991). A predicate issue to finding a statutory violation of § 320.643 is whether an improper objection was made. The issue of whether Mercedes-Benz brought an improper challenge is identical to

one brought before the state tribunals. Further, there can be no doubt that this issue was litigated in the state court and that the decision resulting in a transfer as a matter of law was premised on this determination. Further, on appeal, Mercedes-Benz was afforded an opportunity for a full and fair hearing to argue that its non-qualifications based objection was proper. Hence, this issue is res judicata. *See Greenblatt*, 763 F.2d at 1360. We therefore affirm the district court's decision granting partial summary judgment on the issue of Mercedes-Benz' liability for violating § 320.643.

III. *Treble Damages*

Finally we address the district court's ruling that the award of treble damages be left to the jury's discretion. While this issue is one of first impression, both Florida's legislature and courts have spoken concerning the purpose underlying the Dealer Protection Act. The Act was promulgated, in part, to ameliorate the abusive tactics and harsh practices automobile manufacturers commonly imposed on their franchisees. *See Mercedes-Benz of North America*, 455 So.2d at 410. The legislature sought to achieve its goal of "protect[ing] the public health, safety, and welfare ... by regulating the licensing of ... dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as ... dealers." Fla.Stat. § 320.605.

Appellants contend that § 320.697 is a remedial statute which plainly and unambiguously provides that, upon proof of a statutory violation, a manufacturer is liable for treble damages. As with the question of standing, we are asked to ascertain the meaning of a Florida statute and again we look to the canons of statutory construction.

As stated above, "[w]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the statute must be given its plain and ordinary meaning." *Birnholz*, 880 F.2d at 341; *see also In re*

McCollam, 612 So.2d at 573; *Streeter*, 509 So.2d at 271; *Holly*, 450 So.2d at 219. Merely because the term "shall" was not used does not necessitate a finding of discretionary trebling, for clearly the term "may" is capable of assuming a mandatory character. As with all statutory construction, meaning is determined by ascertaining the intent of the legislature, and words used in a statute must be construed in context and considered in light of the general purpose sought to be accomplished or the evil sought to be remedied. Of paramount importance is the statute's common sense reading. The question is whether legislative usage of the term "may," in the context of the trebling provision and taking into consideration the statute's purpose, is ambiguous.

By focusing on the language relevant to the specific issue of trebling, it becomes clear that the statute does not afford discretion to the trier of fact:

> Any person who has suffered pecuniary loss ... may recover damages in an amount equal to three times the pecuniary loss....

Where the language of a law is clear, judges should not replace it with an unenacted legislative intent. Section 320.697 is clear and unambiguous; its plain language mandates the trebling of damages when "any person" requests them. *See Barry Cook Ford, Inc. v. Ford Motor Co.*, 616 So.2d 512, 516-17 (Fla. 1st DCA 1993).

We note in passing that even if the statute were deemed to be ambiguous, we would be compelled to find that it mandates the trebling of damages. Because the Dealer Protection Act is remedial[3] in nature and designed to promote

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[3] "A remedial action is one that compensates an individual for specific harm suffered, while a penal action imposes damages upon the defendant for a general wrong to the public." *United States v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir. 1993). In deciding whether § 320.697 is remedial or penal, we must examine: "(1)

the public good, its provisions should be interpreted broadly to effectuate its purpose. By enabling successful litigants to recoup treble damages, the legislature's concerns over adjusting the economic power of manufacturers and promoting fair dealing are more likely to be realized. *See International Harvester*, 353 So.2d at 147. Further, the incentive of treble damages is used by legislative bodies to encourage potential litigants to bring suit thereby effectuating private enforcement of statutory violations which further promotes the public good. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 & n. 10, 97 S.Ct. 690, 695-96 & n. 10, 50 L.Ed.2d 701 (1977).

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court on the issue of mandatory trebling and remand for a determination of appropriate damages. In all other respects, the district court's judgment is affirmed.

AFFIRMED in part, REVERSED in part and REMANDED.

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whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered." *Id.* (quoting *Murphy v. Household Fin. Corp.*, 560 F.2d 206, 209 (6th Cir. 1977)). Application of this three prong test leads us to find that the statute is remedial. First, the statute is clearly designed to provide a remedy to an individual wronged by a licensee's violation of the Act. Second, financial recovery runs to the individual, though in a broader context, the public is benefitted when a successful claim is brought under the statute. Third, an award of treble damages is not wholly disproportionate to a wrong that betrays the public welfare. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 & n. 10, 97 S.Ct. 690, 695-96 & n. 10, 50 L.Ed.2d 701 (1977).

HILL, Senior Circuit Judge, dissenting:

I respectfully dissent, not to take issue with the Court's result or to offer a contrary resolution. I dissent because the questions presented are important, heretofore undecided, questions of Florida law and should be certified to the Florida Supreme Court.

The questions are: (1) Does a prospective transferee of an automobile franchise have standing to bring a claim under Section 320.697 of the Florida Statutes (1985)? It seems clear that this statute was designed to protect holders of automobile dealerships. It says that it affords relief to "*[a]ny* person who has suffered pecuniary loss or has been otherwise adversely affected ..." (emphasis added). We hold that this extends protection to a proposed transferee of a dealership and announce that, literally, any person damaged may sue. Do we include prospective managers and employees of transferees, building contractors engaged to construct the new dealership facilities, and others?

(2) Is an automobile manufacturer deemed to have violated Section 320.643 of the Florida Statutes (1985) when it opposes a franchise transfer on grounds other than the transferee's qualifications and moral character? We hold that the act of an automobile manufacturer's calling to the Department of Highway Safety and Motor Vehicle's attention that the manufacturer hesitates to award the franchise to the person or firm stated as the proposed transferee because the manufacturer has been told, earlier, that another was to be the transferee violates the law and subjects the manufacturer to all damages suffered by anyone because of the delay. Must the manufacturer award a franchise to each of several transferees as to whom it has no objection to qualifications or moral character? Does good faith questioning of the bona fides of a proposed transfer subject the offender to damages?

(3) Does Section 320.697 of the Florida Statutes (1985) mandate the trebling of damages? We decide that, under

Florida law, if one *may* bring an action for treble damages the court *may not* award less. I suggest that our interpretation may not predict the view of the state's supreme court accurately—though, of course, it may.

These questions have never been interpreted by the Florida Supreme Court. It should be invited to instruct us on the meaning of Florida law so that the first interpretation of the questions raised by this relatively obscure and unclear statute would be decisive and authoritative, one on which the people of Florida could rely.

I would certify these questions to the Florida Supreme Court. To this Court's failure to use this valuable mechanism.

I dissent.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Civil Action File No. 90-829-CIV-ORL-19

MIKE SMITH PONTIAC, GMC, INC.

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.
AND FEDERAL INSURANCE CO.

Defendants.

FINAL JUDGMENT ON JURY VERDICT

THIS ACTION came on for trial before the Court and a jury, Honorable Patricia C. Fawsett, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged:

1. That pursuant to Count I of the Plaintiff's Amended Complaint, the Plaintiff, MIKE SMITH PONTIAC, GMC, INC. recover of the Defendant, MERCEDES-BENZ OF NORTH AMERICA, INC., the sum of ONE MILLION SIX HUNDRED THOUSAND AND NO/100 DOLLARS ($1,600,000.00), with interest thereon at the rate of TWELVE (12) per cent per annum from October 28, 1987 through July 17, 1992, as provided by law, in the amount of NINE HUNDRED SIX THOUSAND EIGHT HUNDRED SEVENTY-ONE AND 23/100 DOLLARS ($906,871.23), for a total amount of TWO MILLION FIVE HUNDRED SIX THOUSAND EIGHT HUNDRED SEVENTY-ONE AND 23/100 DOLLARS ($2,506,871.23), together with interest accruing thereon from July 17, 1992 at the rate allowed by applicable law, for which amount let execution issue.

2. That pursuant to Counts II, III, IV and V of the Amended Complaint, the Plaintiff take nothing, and that the actions be dismissed on the merits.

3. That pursuant to the Counterclaim brought by MERCEDES-BENZ OF NORTH AMERICA, INC., the Court hereby declares that the Plaintiff, MIKE SMITH PONTIAC, GMC, INC. is MERCEDES-BENZ OF NORTH AMERICA, INC.'s rightful dealer and is the owner of the Mercedes-Benz automobile dealership franchise.

4. The Court hereby reserves jurisdiction to consider motions to tax Plaintiff's attorney's fees and costs pursuant to the stipulation of the parties and Local Rule 4.18.

5. This judgment is without prejudice to the rights of the parties to file motions for judgment as a matter of law, motions for a new trial, and motions to amend the judgment pursuant to Fed.R.Civ.Proc. Rules 50 and 59.

Dated at Orlando, Florida this 24th day of July, 1992.

/s/ Patricia C. Fawsett
U.S. District Court Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Civil Action File No. 90-829-CIV-ORL-19

MIKE SMITH PONTIAC, GMC, INC.

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.
AND FEDERAL INSURANCE CO.

Defendants.

FINAL JUDGMENT FOR COUNTER PLAINTIFFS TERRY TAYLOR, BILLY GRUBBS AND TERRY TAYLOR INVESTMENTS, INC.

THIS CAUSE came on to be heard upon the trial of the cause and the jury having rendered its verdict and the Court being otherwise duly advised in the premises it is considered Ordered and Adjudged as follows:

1. That Final Judgment is hereby entered in favor of the Counter-Plaintiffs, Terry Taylor, Terry Taylor Investments, Inc. and Billy Grubbs and against the Counter-Defendant Mercedes-Benz of North America, Inc. for damages in the amount of Two Million, Eight Hundred and Nine Thousand, Five Hundred and Nineteen ($2,809,519) Dollars, for which let execution issue in accordance with law.

2. The amount set forth in paragraph 1 includes pre-judgment interest in the amount of Three Hundred Thousand, One Hundred an[d] Ninety Eight ($300,198) Dollars.

3. Counter-Plaintiffs, Terry Taylor, Terry Taylor Investments, Inc. and Billy Grubbs are also entitled to costs and a reasonable attorney's fee against the Defendant,

Mercedes-Benz of North America, Inc. Pursuant to the stipulation of the parties entered into at trial, the amount of attorney's fees and costs to be awarded Counter-Plaintiffs in this regard shall be determined by the Court upon subsequent hearing, and this Court retains jurisdiction for this purpose.

4. That this judgment shall bear interest from july 17, 1992 at the rate allowed by applicable law.

DONE AND ORDERED at Orlando, Florida this 24th day of July, 1992.

/s/ Patricia C. Fawsett
Patricia C. Fawsett
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 90-829-CIV-ORL-19

MIKE SMITH PONTIAC, GMC, INC.,

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC. AND FEDERAL INSURANCE CO.,

Defendants.

ORDER

This case was considered by the Court at a hearing on May 15, 1992 upon the following matter:

1. Plaintiff's Second Motion for Partial Summary Judgment and Memorandum of Law in Support thereof (Doc. N[o]. 104, filed February 28, 1992); Plaintiff's Amended Second Motion for Partial Summary Judgment and Memorandum of Law in Support thereof (Doc. No. 106, filed March 2, 1992); Counter-Plaintiffs', Terry Taylor, Terry Taylor Investments, Inc. and Billy Grubbs, Second Motion for Partial Summary Judgment and Memorandum of Law in Support thereof (Doc. No. 108, filed March 9, 1992); Response of Defendant, Mercedes-Benz of North America Inc., in Opposition to Plaintiff's Amended Second Motion for Partial Summary Judgment and Supporting Memorandum of Law (Doc. No. 114, filed March 19, 1992); Defendant's Response in Opposition to Counter-Plaintiffs' Second Motion for Partial Summary Judgment (Doc. No. 118, filed March 24, 1992); and Plaintiff's Reply to Mercedes-Benz's Response to Amended Second Motion for Partial Summary Judgment

(Doc. No. 137, filed May 6, 1992). All parties were represented by counsel.

After considering the filings in the case and the argument of counsel, the Court enters its Order as follows:

STATEMENT OF FACTS

Plaintiff seeks partial summary judgment on the issue of liability of Defendant Mercedes-Benz of North America, Inc. (MBNA) to Plaintiff for civil damages under section 320.697, Florida Statutes based on its breach of section 320.643(2), Florida Statutes. Plaintiff maintains that MBNA's breach of section 320.643(2) has been litigated and any remaining defenses of MBNA are barred by the doctrines of *res judicata* and collateral estoppel. Defendant MBNA responds that Plaintiff's Amended Second Motion for Partial Summary Judgment presents the same facts and law considered by this Court in its August 20, 1991 Order (Doc. No. 69) denying Plaintiff's first motion for partial summary judgment.

Since July 1983, Mike Smith Pontiac, GMC, Inc. (MSP) has operated an automobile dealership in Daytona Beach, Florida, authorized to sell and service Mercedes-Benz automobiles pursuant to a Mercedes-Benz Passenger Car Dealer Agreement which expired on December 31, 1983. A new agreement between MSP and MBNA was entered into for a two-year period beginning January 1, 1984 through December 31, 1985. MSP consisted of the primary dealer-owner, Jerome Ginsburg who owned seventy-five percent of MSP's stock, and the dealer-operator, Mike Smith. Apparently, Mr. Ginsburg held stock transfer documents executed in blank by Mr. Smith for the remaining twenty-five percent of MSP's stock. *Mercedes-Benz v. Mike Smith Pontiac GMC*, 561 So.2d 620, 621 n.1 (Fla. 1st DCA), *review denied*. 574 So.2d 142 (1990).

A dispute arose between Mr. Ginsburg and Mr. Smith in the summer of 1985. Mr. Ginsburg used undated letters of

resignation executed by Mr. Smith to oust Mr. Smith from MSP in June 1985. MBNA invoked Paragraph 15D(g) which allows for termination of the Dealer Agreement due to any disagreements between the dealer operators and owners that adversely affect the business and continue for three months after MBNA notifies the dealer that the disagreement must be resolved. On October 23, 1985, MBNA notified MSP of its intent to terminate the Dealer Agreement because MSP had not sufficiently resolved the management dispute. Pursuant to section 320.641(a)(1), Florida Statutes, a dealer agreement may not be terminated until ninety days after a licensee notifies a dealer of its intent to terminate. Therefore, the Dealer Agreement was extended until the projected termination date of January 31, 1986.

Pursuant to section 320.641, Florida Statutes, MSP filed an administrative complaint with the Department of Highway Safety and Motor Vehicles (Department) claiming unfair termination of the Dealer Agreement. Because MSP filed its complaint within the ninety day notice period, the Dealer Agreement remained in effect by operation of law until the termination dispute was resolved. Fla. Stat. § 320.641(3) (1991).

In October 1986, before the final hearing on the termination action, MSP proposed a transfer of the franchise to Ronald Cutler. On December 15, MBNA filed an administrative complaint to challenge the proposed transfer of the franchise Mr. Cutler. Section 320.643, Florida Statutes, establishes the procedure a licensee must follow to properly challenge a proposed transfer of a franchise. MBNA did not follow the specific guidelines of section 320.643 in challenging the Cutler transfer. MBNA claimed that amended section 320.643 was not applicable because the statute became effective on May 31, 1984, and the MBNA-MSP dealer agreement was executed on January 1, 1984. MBNA's transfer challenge was stayed pending the outcome of the termination action.

Issued on May 1, 1987, the Recommended Order of the Hearing Officer of the Division of Administrative Hearings concluded that termination of the dealer agreement on the ground that MSP violated Paragraph 15D(g) of the Mercedes-Benz Passenger Car Dealer Agreement due to the non-approved change in management and its failure to resolve the management dispute within the ninety day warning period would be fair. After issuance of the Recommended Order, MBNA notified the Department that it had approved the Cutler transfer.

In June 1987, MSP notified MBNA that the Cutler transfer would not take place, and instead, MSP proposed to transfer the franchise to Terry Taylor, Billy Grubbs and Terry Taylor Investments. MBNA filed a complaint with the Department challenging the Taylor transfer on August 28, 1987. Again, MBNA asserted that the newly enacted section 320.643 did not apply, and therefore, MBNA's transfer challenge did not address the qualifications of the proposed transferee as mandated by the statute. Because MBNA challenged the transfer rather than the qualifications of the transferee, MSP filed a motion to dismiss the complaint which was granted on November 9, 1987. Also on November 9, the Department entered a final order dismissing MSP's termination action as moot. The Taylor transfer became effective by operation of law since MBNA failed to properly challenge the transfer according to section 320.643.

MBNA appealed the Department's ruling, claiming that the application of amended section 320.643 to its Dealer Agreement with MSP constituted an impairment of contract in violation of the Florida Constitution and the United States Constitution. Further, MBNA appealed the Department's dismissal of the termination action and claimed that the Department wrongfully concluded that a proposed transfer preempts ongoing termination proceedings. The First District Court of Appeal affirmed the Department's order and found that: amended section 320.643 applied to MBNA; MBNA

improperly challenged the Taylor transfer, thus, the transfer took place by operation of law; and the Department properly dismissed the termination action. *Mercedes-Benz of North America v. Mike Smith Pontiac GMC*, 561 So.2d 620, 625 (Fla. 1st DCA 1990). The Florida Supreme Court denied review of the case. *Mercedes-Benz of North America v. Mike Smith Pontiac GMC*, 574 So.2d 142 (1990).

CONCLUSIONS OF LAW

The Court is presented with a question not answered by the case law or legislative history of section 320.643, Florida Statutes. The question concerning the Court is what effect the granting of partial summary judgment on the issue of MBNA's liability for violating section 320.643 would have on MSP's damage claim under section 320.697, Florida Statutes. Section 320.697, Florida Statutes, provides that:

> Any person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of §§ 320.60-320.70, notwithstanding the existence of any other remedies under §§ 320.60-320.70, has a cause of action against the licensee for damages and may recover damages therefor in any court of competent jurisdiction in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee to be assessed by the court. Upon a prima facie showing by the person bringing the action that such a violation by the licensee has occurred, the burden of proof shall then be upon the licensee to prove that such violation or unfair practice did not occur.

MSP asserts that the administrative and state proceedings have established that MBNA violated section 320.643. Further, in a proceeding on the issue of damages, MBNA would be estopped by the doctrines of *res judicata* and collateral estoppel from bringing up all of the factual reasons, which have already been determined insufficient defenses for noncompliance with Section 320.643, refuting MSP's claims

for damages and alleging MSP's failure to mitigate its damages.

In contrast, MBNA asserts that the administrative and state proceedings did not address the issue whether MBNA's challenge to the proposed transfer was reasonable under the circumstances. MBNA interprets section 320.643 to provide a rebuttable presumption that a transfer challenge on the grounds other than the moral character or business experience of the proposed transferee is only presumed to be unreasonable. According to MBNA, *res judicata* and collateral estoppel do not apply to the instant case because MBNA has not had the opportunity to rebut the presumption of unreasonableness.

The Supreme Court has held that issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal suit. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 83 (1984) (A litigant was barred from bringing a § 1983 action in federal court when the litigant could have raised the claim but did not raise it in an earlier state court proceeding). Further, *res judicata* principles apply to administrative hearings. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966). "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Id.* at 421-22. Finally, there is authority for granting partial summary judgment on the issue of liability based on an administrative ruling in a subsequent suit for damages. *Painters Dist. Coun. No. 38, Etc. v. Edgewood Contracting Co.*, 416 F.2d 1081, 1085 (5th Cir. 1969) (the NLRB's finding that the union engaged in unfair labor practices and violated section 8(b) of the National Labor Relations Act was *res judicata* on the issue of liability in a subsequent damages suit).

The above cases provide little guidance beyond general legal principles that are not directly on point. MSP asserts that because MBNA challenged the proposed transfer rather than the proposed transferee and because MBNA did not base its challenge on the moral character or business experience of the proposed transferee, MBNA violated section 320.643. MSP maintains that section 320.643 is a strict liability statute, and a failure to comply with the statute is a violation of the statute. *See Bayview Buick-GMC Truck, Inc. v. General Motors Co.*, 1992 WL 76434, *2 (Fla. 1st DCA) ("These provisions [meaning §320.643(1)] are unambiguous. The plain meaning of section 320.643(1) is that if a manufacturer does not formally object to the qualifications of a proposed transferee within sixty days of notice of the proposed transfer, the franchise transfers to the proposed transferee by operation of law.") While the *Bayview* case and the plain meaning of the statute make clear the conditions by which a licensee may challenge a proposed transfer, the case law and language of the statute do not state expressly that challenging a transfer on other grounds automatically leads to treble damages.

The Recommended Order issued by the Hearing Officer of the Division of Administrative Hearings (Exhibit B of Exhibits to Affidavit of Wayne Samson, Doc. No. 63) made reference to a case discussing the legislative intent behind section 320.641 regarding unfair cancellation of franchise agreements. In *International Harvester Co. v. Calvin*, 353 So.2d 144 (Fla. 1st 1978), the court reviewed an order of the Director of the Division of Motor Vehicles setting aside an attempted cancellation of a franchise agreement between a truck manufacturer and a dealer. The statutory authority discussed in *International Harvester* is section 320.641 which allows a dealer to file a complaint with the Department for a determination of whether a cancellation of the franchise agreement is unfair.

Sections 320.60-70 were enacted as part of a legislative scheme to insure fair dealing at all levels between motor

> vehicle manufacturers, the dealers and the consuming public. Section 320.641 specifically deals with unfair cancellations of franchise agreements and . . . for administrative review by the Director. . . . [I]t is obvious the legislative intent was to redress the economic imbalance which customarily exists between national manufacturers and local dealers. A second reason for agency review is to protect dealerships from arbitrary and discriminatory action when manufacturers seek to impose the franchise agreement's broad requirements upon dealers as a pretext to terminate.

Id. at 147-48.

The Hearing Officer also looked to 15 U.S.C. §§1221-1222 which is known as the Dealer's Day in Court Act. Section 1222 provides a civil cause of action for dealers who suffer damages caused by the failure of an automobile manufacturer "to act in good faith in . . . terminating, canceling, or not renewing the franchise with said dealer." Ultimately the Hearing Officer concluded that the interpretation of the federal statutory scheme by the federal courts was not particularly helpful in determining how the Florida statute should be applied.

While discussions of the federal statute and section 320.641 of the Florida statute may not be particularly helpful to an understanding of the intended connection between a violation of section 320.643 and a cause of action for civil damages under section 320.697, some observations are instructive. First, unlike section 320.643, section 320.641(6) specifically states that a complainant who prevails in challenging an unfair cancellation of a franchise agreement has a cause of action under section 320.697. The significance of expressly providing for a section 320.697 civil damages action in section 320.641 and no such express provision in section 320.643 is not clear. However, a determination under section 320.641 that the franchise termination is unfair does

not automatically provide relief to the prevailing dealer. In contrast, as in the instant case, under section 320.643, a determination that the licensee has not properly challenged the proposed transfer gives the dealer an automatic remedy by making the proposed transfer effective by operation of law.

Second, the federal statute authorizing automobile dealer suits against manufacturers, 15 U.S.C. §§1221-1225, provides "[t]hat in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith." 15 U.S.C. §1222. Clearly, the intent of the federal legislation was that a manufacturer who failed to act in good faith in "performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer," would not be subject to automatic damages without the opportunity to present defenses. 15 U.S.C. §1222.

Upon consideration of the above, the Court concludes that MBNA did violate section 320.643 as determined by the previous administrative and judicial proceedings. The remedy provided by the statute for violation of section 320.643 is that the proposed transfer from MSP to Terry Taylor, et al., became effective by operation of law. Therefore, as to MBNA's liability for violation of section 320.643, Florida Statute, MSP's Amended Second Motion for Partial Summary Judgment (Doc. No. 106) is **GRANTED**. MSP's Second Motion for Partial Summary Judgment (Doc. No. 104) is moot. Further, MBNA is not barred from bringing any defenses it may have to MSP's action for damages under section 320.697.

The doctrines of *res judicata* and collateral estoppel are not applicable to the instant case. The Eleventh Circuit in *Adams v. Sewell* held that a terminated employee was not barred by *res judicata* from relitigating the factual context of his dismissal in a federal court action claiming violations of

substantive and procedural due process even though the same factual context was litigated in a state court proceeding seeking reinstatement. *Adams v. Sewell*, 946 F.2d 757, 764 (11th Cir. 1991). "Questions of law have little meaning outside the factual context of a particular case, and no reasonable jury could resolve these legal issues without considering the facts and evidence proffered by each party in support of their claims." *Id.*

A determination that MBNA violated section 320.643 is *res judicata*, and the result of MBNA's violation of section 320.643 is that the transfer from MSP to Terry Taylor, et al. became effective. However, a determination that MBNA's violation of section 320.643 proximately caused MSP damages has not been litigated. Like the *Adams v. Sewell* case, the legal determination that MBNA's violation of section 320.643 proximately caused MSP damages can not be made outside the factual context of this case. Therefore, a determination that MBNA violated section 320.643 does not bar MBNA from bringing in any defenses, even those that were determined to be insufficient in the transfer challenge proceedings.

DONE AND ORDERED at Orlando, Florida, this 29th day of May, 1992.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record.

Supreme Court, U.S.
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(2)

No. 95-590

IN THE

Supreme Court of the United States

October Term, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Petitioner,

v.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC., AND BILLY GRUBBS,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED AND RESTATED

1.WHETHER THE FIRST AMENDMENT RIGHT TO PETITION IMMUNIZES AN AUTOMOBILE MANUFACTURER FROM ITS VIOLATION OF FLORIDA'S DEALERSHIP TRANSFER LAW CAUSED BY ITS REFUSAL TO RECOGNIZE A FRANCHISE TRANSFER.

2.WHETHER THE COURT OF APPEALS ERRED IN EXERCISING ITS DISCRETION NOT TO CERTIFY TO THE FLORIDA SUPREME COURT STRAIGHTFORWARD, NON-DISPOSITIVE STATE LAW ISSUES WHICH HAVE NO BEARING ON ANY FEDERAL CONSTITUTIONAL ISSUE.

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MERCEDES-BENZ OF NORTH AMERICA, INC.,
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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Mercedes-Benz of North America, Inc. ("Mercedes-Benz") sets out in detail the numerous and bitter battles which it has waged over the past ten (10) years against Mike Smith Pontiac, GMC, Inc. ("MSP").[1] Ultimately, however, this case

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1 An objective account of the history of the Mercedes-Benz-MSP franchise relationship and surrounding litigation is found in the controlling decision of Florida's First District Court of Appeal, *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So.2d 620, 621-22 (Fla. 1st Dist. Ct. App.), *review denied*, 574 So. 2d 142 (Fla. 1990) (App. A).

centers upon the proposed transfer of MSP's Mercedes-Benz dealership to Terry Taylor ("Taylor"),[2] a transfer which Mercedes-Benz was required to recognize under Section 320.643(2), Florida Statutes (1985) ("dealership transfer law") (App. B). The Florida First District Court of Appeal ("the First DCA") has held in a previous stage of this very litigation that, under Section 320.643(2), Mercedes-Benz could avoid this obligation only if it mounted a successful challenge to the proposed transferee's qualifications. *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So. 2d 620, 624 (Fla. 1st Dist. Ct. App.), *review denied*, 574 So. 2d 142 (Fla. 1990) (App. A). That same state court found that Mercedes-Benz's only reason for unlawfully refusing to recognize the MSP-Taylor dealership transfer was the vague threat of a lawsuit against Mercedes-Benz by Cutler, a disgruntled formerly proposed transferee. *Id.*

The state court held that this statutorily unauthorized reason could not excuse Mercedes-Benz's unlawful refusal to recognize the dealership transfer, and that a transfer of the franchise resulted. *Id.* at 624-25. Thus, Taylor has been wrongfully deprived of MSP's Mercedes-Benz dealership by Mercedes-Benz and has suffered lost profits as a consequence, even while Mercedes-Benz admitted at trial that Taylor was qualified to be a Mercedes-Benz dealer. [R 29-(205, 220, 300).]

The circuit court of appeals, the district court, the First DCA, and the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") have all held that vague threats of suits from third parties are not grounds for refusing to

---

2 The proposed transferees of MSP's dealership, Terry Taylor, Billy R. Grubbs, and Terry Taylor Investments, Inc., will be collectively referred to as "Taylor." Terry Taylor Investments, Inc. has no parent or subsidiaries.

recognize a dealership transfer under Florida law, and that the only permissible objection is to the transferee's qualifications. Thus, Mercedes-Benz's unlawful refusal to recognize the dealership transfer could not be justified, constituting an express violation of part of Sections 320.60-.70, Florida Statutes (1985) (Florida's Dealer Protection Act). Under Section 320.697, Florida Statutes (1985) (App. C), the only requirement for a cause of action is a violation of Sections 320.60-.70. Mercedes-Benz's illegal conduct thus gave Taylor a statutory cause of action. Ignoring that Taylor was fully qualified to be its dealer and the decisions of both the DHSMV and the First District Court of Appeal, Mercedes-Benz irrationally chose to violate Florida's dealership transfer law.

For purposes of its petition, Mercedes-Benz must concede that it violated Florida's Dealer Protection Act. Otherwise, it would be unnecessary for this Court to decide any federal constitutional issue, precluding the exercise of this Court's jurisdiction. *See Rescue Army v. Municipal Court,* 331 U.S. 549, 568-74 (1947) (Supreme Court will not exercise its jurisdiction to decide a constitutional issue when an alternative ground is presented which will avoid constitutional adjudication). Mercedes-Benz argues, however, that it is not responsible for its violation of Florida law, because the First Amendment right to petition somehow usurps Florida's statutory scheme and protects a manufacturer from the consequences of violating these state statutes.

Mercedes-Benz fundamentally misstates the case when it asserts that the "sole basis" for its statutory liability was because it filed an administrative complaint. [Petition at 17.] Contrary to Mercedes-Benz's unsupported assertion that Mr. Taylor claimed damages simply because Mercedes-Benz filed an administrative complaint which was dismissed as it failed to meet statutory requirements,

Mr. Taylor unequivocally testified that he was damaged because he could not obtain the Mercedes-Benz franchise:

> Q. Sir, did you suffer financial losses as a result of not obtaining the Mercedes-Benz franchise in 1987?
>
> A. (Taylor) Definitely, yes, sir.

[R 23-107.] The reality and amount of Taylor's lost profit damages are not challenged by Mercedes-Benz.

Taylor has undeniably suffered and will continue to suffer injury as a direct consequence of Mercedes-Benz's illegal actions in refusing to recognize a franchise transfer which a Florida court has already once held Mercedes-Benz must recognize. *Mercedes-Benz,* 561 So. 2d at 624-25. The jury acknowledged this holding by rendering a verdict in Taylor's favor on the only claim he asserted against Mercedes-Benz. [R 15-262-1.] The verdict of the jury applied provisions of Florida's dealership transfer law, which had already been definitively interpreted by a Florida appellate court in this very matter, only two years before the verdict. [R 15-248-(6-7)]; *Mercedes-Benz,* 561 So. 2d 620 (Fla. 1st Dist. Ct. App. 1990). In this diversity case, the jury's verdict for Taylor was directly based on that controlling state court interpretation of state law, and confirmed that Mr. Taylor was an innocent victim who had been extensively damaged by Mercedes-Benz's refusal to recognize the transfer of MSP's dealership.

Section 320.643(2), Florida Statutes (1985), requires a motor vehicle manufacturer to recognize the transfer of any dealership equity interest to a qualified transferee. As a condition for a manufacturer to attempt to prevent such a transfer, it is required to file an administrative complaint with the DHSMV, which must challenge the qualifications of the proposed transferee:

> A licensee [manufacturer]...may...file with the department a verified complaint for a determination that the proposed transferee is not a person **qualified** to be a transferee under this section.

FLA. STAT. § 320.643(2)(a) (1985) (emphasis added). An automatic transfer of the franchise results by operation of law if and only if: (1) the manufacturer violates the statute by failing or refusing to recognize a proposed transfer, and (2) fails to justify its actions through a successful challenge to the transferee's qualifications. *Id.* Section 320.697, Florida Statutes (1985), provides a treble damages remedy to "any person" harmed by a manufacturer's violation of Florida's Dealer Protection Act (Sections 320.60-.70), including Section 320.643(2), the dealership transfer law.

After Mercedes-Benz was advised of the proposed transfer of MSP's dealership to Taylor, Mercedes-Benz informed MSP's principals that Mercedes-Benz was rejecting the proposed sale. [Plaintiff's Exhibit ("Px") 92.] Mercedes-Benz then filed a complaint with the DHSMV objecting to the transfer, expressly invoking the authority of Section 320.643(2). [Px 93-1.] The DHSMV dismissed Mercedes-Benz's complaint with prejudice, because it contained no statutorily required allegation that Taylor was unqualified to be a transferee and because it lacked the statutorily required verification. [Px 121-(2-3).] In accordance with Section 320.643(2), the DHSMV ordered that the franchise agreement was deemed amended to substitute Taylor for MSP as Mercedes-Benz's franchisee. [Px 121-3.]

Mercedes-Benz appealed the DHSMV's order to the First DCA, raising in that court Mercedes-Benz's constitutional attacks on the DHSMV's application of Section 320.643(2) to Mercedes-Benz. In the First DCA, Mercedes-Benz raised a federal due process challenge and a challenge based on the right of access to courts under Article I, Section 21 of

Florida's Constitution. In its petition, Mercedes-Benz now claims that the First DCA did not have the "opportunity" to consider its First Amendment argument. [Pet. at 17 n.12]. Mercedes-Benz ignores that the reason no such "opportunity" occurred was because it failed to raise its First Amendment right to petition argument in the state court in an effort to prevent the statutory transfer of the franchise and the consequential violation of Florida law from refusing to recognize the transfer. [Px 192 (24-28; 42-43).] Thus, having failed to timely raise this argument in the state court proceeding which was binding on it, Mercedes-Benz is foreclosed under basic principles of *res judicata* from attempting to raise this argument now.

Rejecting Mercedes-Benz's constitutional arguments, as well as its argument that it could raise other types of objections to the transfer, the First DCA held that Mercedes-Benz's complaint under Section 320.643(2)(a) was facially deficient in two respects. *Mercedes-Benz,* 561 So. 2d at 624. The court held that a complaint under this provision "must allege that the proposed transferee is not qualified under the terms of the statute." *Id.* (emphasis added). Examining the whole of Section 320.643, the court found that the only "qualifications" referred to anywhere in the statute were the proposed transferee's moral character and business experience. *Id.* The state court noted that Mercedes-Benz's complaint raised absolutely no objection to Taylor on any basis and was not verified:

> In the instant case, [Mercedes-Benz's] complaint was silent as to the qualifications of the Taylor transferees. In fact, the only basis for [Mercedes-Benz's] complaint was its fear that Cutler, the first-proposed transferee, would successfully force a transfer under the original transfer agreement. Since this is not a proper basis for a transfer challenge, the Department correctly dismissed

> the complaint. The complaint's verification, which was conditional and therefore inadequate, constituted further grounds for dismissal.

Id. (footnote omitted). As Mercedes-Benz's complaint plainly failed to meet the requirements of Section 320.643(2)(a), it could not begin to excuse Mercedes-Benz's continued, unlawful refusal to recognize the dealership transfer. As a result, the state court held that a "transfer" of the franchise to Taylor was effected "by operation of law." *Id.* at 625.

Subsequently, Taylor brought a counterclaim in the federal district court, seeking damages under Section 320.697, Florida Statutes (1985), for Mercedes-Benz's refusal to recognize the transfer of MSP's dealership to Taylor in accordance with Section 320.643(2). Mercedes-Benz acknowledged during trial that it has never raised any objections whatsoever to Taylor as the proposed operator of this Mercedes-Benz dealership:

> The Court: [A]nd frankly, the evidence here is that there were no objections to Mr. Taylor
>
> Mr. Dunaj: [Mercedes-Benz's counsel] Absolutely.
>
> The Court: — either in fact or in the petition –
>
> Mr. Dunaj: That's right.
>
> The Court: — to his qualifications and moral character.

[R 37-(36-37).] Based upon Section 320.643(2), and the First DCA's interpretation and application of that statute in the previous stages of this litigation, the federal district court granted partial summary judgment to Taylor and MSP on the issue of Mercedes-Benz's violation of Section 320.643(2). [Px. 8-152-(10-12).] The issues of causation, the defenses of mitigation, and the amounts of damages were all submitted

to the jury. [R 14-248-(6-7, 17-21).] The jury found in favor of Taylor and MSP on their claims for damages arising from violation of Section 320.643(2).

On appeal by both sides, the Eleventh Circuit Court of Appeals affirmed the judgment against Mercedes-Benz, which had challenged the application of *res judicata*/collateral estoppel and Taylor's standing under the Florida statute. Mercedes-Benz also raised its argument asserting immunity from liability under the First Amendment right to petition coupled with the right to access courts under Florida's Constitution. The court of appeals reversed the district court's determination that treble damages were permissive and held that Florida's statutory scheme required that these damages be trebled as a matter of law. However, the court of appeals nowhere addressed Mercedes-Benz's First Amendment argument, obviously finding it completely meritless. Even the dissent, which did "not ... take issue with the Court's result," did not address the First Amendment issue, but was only concerned with certification of certain issues to the state supreme court. *Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 32 F.3d 528, 535 (11th Cir. 1994) (Hill, J., dissenting), *petition for cert. filed*, 64 U.S.L.W. 3297 (U.S. Oct. 11, 1995) (No. 95-590).

SUMMARY OF ARGUMENT

There is no basis for granting the petition predicated on Mercedes-Benz's arguments concerning the First Amendment right to petition and the related *Noerr-Pennington* doctrine, because these issues are nowhere addressed by the court of appeals. Furthermore, the right to petition has no possible application to Mercedes-Benz's actions in this case, because Taylor's damages are caused by Mercedes-Benz's illegal refusal to recognize the transfer of its franchise, not by its filing an invalid and meaningless administrative complaint. Mercedes-Benz unquestionably failed to follow the requirements of Florida's dealership transfer law, and therefore cannot claim that its actions in defiance of Florida law are protected by the right to petition or the *Noerr-Pennington* doctrine.

The court of appeals correctly exercised its discretion in not certifying certain state law issues to the Florida Supreme Court. Each of these issues was readily determined by the application of well-established principles of Florida law. Further, the state law issues, in themselves, were not determinative of the entire case, a jurisdictional requirement for certification to the Florida Supreme Court. The court of appeals properly exercised its discretion based on additional factors of increased delay and expense. There is certainly no valid basis for concluding that the court of appeals erred in its discretionary decision not to certify the particular issues in this case.

REASONS FOR DENYING THE PETITION

I.

THE FIRST AMENDMENT RIGHT TO PETITION IS NOT IMPLICATED BY MERCEDES-BENZ'S VIOLATION OF FLORIDA LAW IN REFUSING TO RECOGNIZE THE MSP-TAYLOR DEALERSHIP TRANSFER.

Mercedes-Benz claims that the decision in this case creates conflict with decisions of other federal circuit courts and with decisions of this Court based on Mercedes-Benz's asserted First Amendment right to petition. However, the court of appeals' decision in this case nowhere addressed (including the dissent) this issue of the right to petition. Thus, the decision in this case could not possibly create inter-circuit conflict, and could not possibly be inconsistent with the decisions of this Court. Conflict which will support review by certiorari cannot be based on pure inference and speculation. Rather, there must be a "real and embarrassing conflict of opinion." *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951). Since the court of appeals neither "rendered a decision in conflict" with another court of appeals' decision nor "decided a federal question" in conflict with this Court's decisions, there is no palpable basis for granting certiorari. *See* SUP. CT. R. 10.

Mercedes-Benz further argues that there is some theoretical disagreement among the circuits as to whether a doctrine derived from the First Amendment right to petition, the *Noerr-Pennington* doctrine, applies outside of antitrust cases. However, this point is completely irrelevant to this case. Indeed, Taylor never argued to the court of appeals that the *Noerr-Pennington* doctrine was limited to antitrust cases, so it is impossible to ascertain that this was the reason the court of appeals decided not to address

Mercedes-Benz's arguments. Furthermore, Mercedes-Benz raised these same right to petition/*Noerr-Pennington* arguments in its petition for rehearing *en banc*, to which no response was filed. Yet, once again not a single judge on the entire court voted to rehear this First Amendment issue. Thus, Mercedes-Benz's assertion that the *Noerr-Pennington* doctrine's inapplicability outside of antitrust cases formed the basis of the court of appeals' decision is utter speculation.

What Mercedes-Benz steadfastly ignores is that its First Amendment argument suffers from a far more fundamental defect which was much more likely the real basis for its rejection. Mercedes-Benz did not become liable for statutory damages by simply filing a legally nugatory administrative complaint. As Florida's dealership transfer law makes clear, Taylor is given a cause of action to seek recovery for damages resulting from Mercedes-Benz's unlawful refusal to recognize the transfer of MSP's dealership to Taylor:

> [A] licensee [manufacturer] shall not...fail or refuse to give effect to, [or] prevent...any motor vehicle dealer...from selling, assigning, [or] transferring...in whole or in part, the equity interest...in such motor vehicle dealer to any other person....

FLA. STAT. § 320.643(2)(a) (1985). Taylor's damages, consisting of lost sales profits due to Mercedes-Benz's refusal to recognize the dealership transfer, were caused by his loss of the Mercedes-Benz franchise, not by Mercedes-Benz's act of filing a meaningless complaint with the DHSMV.[3]

---

3 The jury instructions also made clear that Taylor's and MSP's claims were "that they each suffered pecuniary damage because Mercedes-Benz violated § 320.643 of Florida's Dealer Protection Act by refusing to approve the proposed transfer of the franchise...." [R 15-248-6] (emphasis added).

Mr. Taylor's testimony made this point abundantly clear. [R 23-107.]

Indeed, Taylor would have suffered the same lost profits from Mercedes-Benz's continuing refusal to recognize the dealership transfer regardless of whether Mercedes-Benz filed an administrative complaint with the DHSMV. Had Mercedes-Benz simply refused to recognize the transfer and not filed a complaint, there would have been no act on which Mercedes-Benz could even base its First Amendment argument. Yet, the harm to Taylor would have been identical — he would still have been denied the franchise. Certainly, it defies logic to argue that Mercedes-Benz could become completely immune from statutory liability for refusing a franchise transfer by filing an inoperative, meaningless administrative complaint. The act of filing a legally useless complaint cannot possibly be the genesis of absolute constitutional immunity from liability under the Dealer Protection Act when the harm to Taylor is the same regardless of this action.

The challenge procedure provided by Section 320.643(2)(a) cannot possibly serve to immunize an unsuccessful challenger from liability for the violation of the statute's substantive command. Mercedes-Benz's invalid "petitioning" activity "may not be used as the means or the pretext for achieving 'substantive evils'...which the legislature has the power to control."[4] *California Motor Transport*

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4 The jury instruction Mercedes-Benz received on its First Amendment defense recognized this legal principle:

> A party has a legal right to have its claim or defense determined in an appropriate court or other appropriate forum. However, such right does not excuse a party from compliance with the law. The right of access to courts may not be used to excuse a party from payment of damages, if any, for a wrongful act which is committed contrary to the law. [R 15-248-(20-21).]

Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972) (citation omitted). Legislatures are not prohibited from making certain conduct illegal " 'merely because the conduct was in part initiated, evidenced, or carried out by means of' " speech or writing. *Id.* at 514 (quoting *Giboney v. Empire Storage Co.,* 336 U.S. 490, 502 (1949)). If this were the case, violators of a statute could always create some "petition" to shield themselves from liability for engaging in the very conduct that the statute prohibits. *Litton Systems, Inc. v. American Tel. & Tel. Co.,* 700 F.2d 785, 806-07 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073 (1984). Petitioning activities are not immune "when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport,* 404 U.S. at 514.

Indeed, so long as a substantive violation of law is shown, the right to petition will not insulate a wrongdoer from liability even if a "petitioning" activity is the sole source of a party's injury, *e.g.,* damages based solely upon the expense of litigation. *See Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.,* 814 F.2d 358, 360, 372-75 (7th Cir. 1987). If the situation were otherwise, any claim by which a party obtained damages based upon the expense of litigation itself would violate the right to petition — *e.g.,* the tort of abuse of process or any attorney's fee-shifting statute. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 471-73 (7th Cir. 1982), *cert. denied,* 461 U.S. 958 (1983); *Premier Elec.,* 814 F.2d at 373.

Moreover, First Amendment protections for petitioning activity do not extend to Mercedes-Benz's administrative complaint, because Mercedes-Benz advocated no position and did not attempt to influence government action through its complaint. The *Noerr-Pennington* doctrine and the related right to petition protect only those activities which embody traditionally protected First Amendment values, *i.e.,* advocating a particular position before the government

and attempting to influence corresponding government action, as through lobbying or political discourse. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-41 (1961); United Mine Workers v. Pennington,* 381 U.S. 657, 669-70 (1965); *California Motor Transport,* 404 U.S. at 510-11. In short, the *Noerr-Pennington* doctrine is not implicated by petitioning activities which are "more economic than political in nature." *Todorov v. DCH Healthcare Auth.,* 921 F.2d 1438, 1446 n.14 (11th Cir. 1991).

Mercedes-Benz's decision to refuse to recognize the MSP-Taylor transfer was a purely private business decision on its part, "no element of which involved seeking to procure the passage or enforcement of laws." *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707 (1962). Merely because Mercedes-Benz sought to legitimize its continuing refusal to recognize the transfer through the ineffective and invalid invocation of a statutory challenge procedure does not immunize Mercedes-Benz for violating substantive statutory prohibitions. *Litton Systems,* 700 F.2d at 807; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.,* 690 F.2d 1240, 1263-65 (9th Cir. 1982), *cert. denied,* 459 U.S. 1227 (1983).

Indeed, Mercedes-Benz had no position whatsoever to advocate before the DHSMV when it filed its complaint. According to Mercedes-Benz, it was a hapless victim of conflicting claims of ownership in MSP's Mercedes-Benz franchise. [Pet. at 9.] Thus, in what was basically an interpleader action, Mercedes-Benz joined all parties with a colorable claim to the franchise and surrendered the franchise to the DHSMV for its determination of who was the rightful claimant to the franchise. *Id.* Mercedes-Benz asserted that it was entirely neutral as to the outcome of the administrative process.

Because Mercedes-Benz's administrative complaint pursued no fundamental, substantive right or furthered any particular position, Mercedes-Benz's complaint was not the type of petitioning activity aimed at influencing the government which is protected by the *Noerr-Pennington* doctrine or the First Amendment right to petition. Every legal pleading does not come "trailing clouds of First Amendment glory." *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 420 (7th Cir. 1988). Neither the market-place of ideas nor the vitality of public debate was enriched through Mercedes-Benz's facially deficient complaint. "[N]ot every legal gesture — not every legal pleading — is protected by the First Amendment." *Id.* at 419.

Additionally, the *Noerr-Pennington* doctrine and the right to petition protect only procedurally valid and lawfully recognized petitions. Petitioners only have "the right of access to agencies and courts, **within the limits, of course, of their prescribed procedures.**" *California Motor Transport,* 404 U.S. at 515 (emphasis added). Government must be able to place reasonable procedural restrictions on the right to petition. No absolute right to petition the government exists outside these procedures. If the right to petition were absolute, all rules of court, statutes of limitation, etc., would abridge the right to petition. In the instant case, Mercedes-Benz's "petition" facially violated statutory requirements as it failed to object to Taylor's qualifications and did not contain the required verification. Such an invalid "petition" could not possibly implicate First Amendment rights.

The right to petition exists to enable citizens to enlist the government's assistance in redressing legally recognized "grievances." Under Florida's dealership transfer law, Mercedes-Benz raised no statutorily permissible objection concerning a proposed transferee's qualifications. Because Mercedes-Benz recognized that Taylor was qualified

in every respect, it had no "grievance" about which it could petition under the statutory scheme. The right to petition will not protect petitioning efforts which ignore or defy the substantive rule of decision provided by statute. *Premier Elec.,* 814 F.2d at 375. Neither the *Noerr-Pennington* doctrine nor the right to petition protects Mercedes-Benz's efforts to claim more than the substantive law allows. *Id.* "A request for something that, if granted, is unlawful, is also unlawful." *Id.* at 376. Mercedes-Benz's conduct, including its complaint, was unlawful as Mercedes-Benz had no statutorily permissible reason to refuse the MSP-Taylor dealership transfer. Therefore, the right to petition cannot possibly immunize Mercedes-Benz's unlawful conduct in refusing to recognize the transfer.

In sum, the First Amendment right to petition is not remotely implicated by Mercedes-Benz's violation of Florida's dealership transfer law. The decision in this factually complex, diversity case addressed only state law issues on its face and did not address this First Amendment issue, or any federal issue, because Mercedes-Benz's arguments were facially meritless. As this case raises no federal constitutional issues, either explicitly or implicitly, there is no realistic basis for this Court's review.

II.

THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN NOT CERTIFYING TO THE FLORIDA SUPREME COURT EASILY DETERMINED, NON-DISPOSITIVE STATE LAW ISSUES WHICH WERE UNCONNECTED TO ANY FEDERAL ISSUES.

Mercedes-Benz asserts that the court of appeals "erred" in "refusing" to certify "dispositive" state law issues to the Florida Supreme Court. This position ignores several important points. First, as this Court made clear in its 1974 decision in *Lehman Brothers v. Schein,* 416 U.S. 386 (1974), the decision to certify a state law issue "in a given case rests in the sound discretion of the federal court." *Id.* at 391.

Second, Mercedes-Benz overlooks that Florida's Constitution only permits certification of a question of law "which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." FLA. CONST., Art. V, § 3(b)(6)(1980); FLA. R. APP. P. 9.030(a)(2)(C) (emphasis added).[5] Only three state law issues were considered by the court of appeals: 1) application of *res judicata* / collateral estoppel principles; 2) Taylor's standing to sue under Florida's Dealer Protection Act; and 3) whether

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5 Under Florida's "rather strict constitutional requirements," the Florida Supreme Court can only accept certified questions of law when "they are determinative of a particular case." G. Kogan & R. Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151, 1246-47 (1994) (Justice Gerald Kogan currently sits on the Florida Supreme Court). Florida's constitutional requirements are more restrictive than those outlined in the UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 49 (1967).

statutory damages should be trebled as a matter of law under that same act.

The application of *res judicata*/collateral estoppel principles is, of course, well established in Florida's case law. *See, e.g., Florida Real Estate Comm'n v. Harris,* 134 So.2d 785 (Fla. 1961), *cert. denied,* 371 U.S. 7 (1962); *Shearn v. Orlando Funeral Home,* 88 So.2d 591 (Fla. 1956); *Hay v. Salisbury,* 109 So. 617, 621 (Fla. 1926). Because application of these well-established doctrines was hardly a novel issue in Florida's jurisprudence, the court of appeals was obliged to determine this straightforward legal issue. As this Court warned in *Lehman Brothers,* federal courts should not abdicate their judicial duties through certification to state courts:

> [M]ere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit. We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory.

416 U.S. at 390-91. Because Florida law on *res judicata*/collateral estoppel was well-established, the court of appeals had no option but to apply this law to the case.

The second state law issue concerned Taylor's standing under Section 320.697, which created a statutory cause of action for "any person." Mercedes-Benz contended that "any person" actually meant an "existing Mercedes-Benz dealer." This issue obviously was not difficult for the court of appeals which simply applied well-established rules of

statutory construction governing "plain meaning."[6] Furthermore, there was guiding Florida case law which had found standing for a proposed transferee under a related provision in Florida's Dealer Protection Act. *See Bayview Buick-GMC Truck, Inc. v. GMC,* 597 So.2d 887 (Fla. 1st Dist. Ct. App. 1992). In any event, disposition of this issue could not determine the cause since MSP would continue to have a claim, regardless of the outcome of the decision on Taylor's standing.

The third state law issue concerned whether pecuniary damages should be trebled as a matter of law under Section 320.697, Florida Statutes. Again, Mercedes-Benz presents no substantive showing that the Florida Supreme Court would have reached a different conclusion than the court of appeals concerning the straightforward "plain meaning" of the treble damages statute, Section 320.697. Furthermore, this issue only involved the amount of damages, so it could not possibly determine the entire case. Since this damages issue was certainly non-dispositive, it could not have been certified to the state supreme court.

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6 Mercedes-Benz's assertion that a decision upholding Taylor's standing was inconsistent with *Gans v. Miller Brewing Co.,* 560 So.2d 281 (Fla. 4th Dist. Ct. App.), *review denied,* 574 So.2d 140 (Fla. 1990), has been consistently rejected as vacuous by every court in which Mercedes-Benz raised this argument. The statute in *Gans* was part of a completely different franchise law for beer distributors, which expressly limited remedies to the existing "distributor with whom [the franchisor] has a written contract." *Id.* at 282. In contrast, Florida's Automobile Dealer Protection Act creates remedies for "any person." After the Eleventh Circuit's decision in this case, the Florida Supreme Court made even clearer that a statutory remedy for "any person" means any person. *See Auto-Owners Ins. Co. v. Conquest,* 658 So.2d 928 (Fla. 1995) (statutory remedy for "any person" aggrieved under the Unfair Insurance Practices Act unambiguously includes any person, and is not limited to insureds.)

Mercedes-Benz misplaces its reliance on *Lehman Brothers* for yet another reason. In that case, a federal court in New York was attempting to determine unsettled state law issues in Florida, a "distant state." This Court noted that the federal circuit court judges in New York were " 'outsiders' lacking in the common exposure to local law which comes from sitting in the jurisdiction." *Id.* at 391. There is no such concern here, as the Eleventh Circuit is quite familiar with Florida law. Indeed, the court of appeals' decision was written by Judge Rosemary Barkett, immediate former Chief Justice of the Florida Supreme Court.[7]

Mercedes-Benz's reliance on several decisions of this Court certifying issues to state supreme courts is also misplaced. In each of those cases, the state law issues which were certified were necessary to or could avoid the disposition of a federal constitutional issue before this Court. *See Virginia v. American Booksellers Assoc.*, 484 U.S. 383 (1988) (certification of state issues regarding interpretation of state law necessary to determine potential First Amendment infringement); *Mills v. Rogers*, 457 U.S. 291 (1982) (remanded for consideration of certification of state constitutional issues concerning privacy interests which could avoid decision on federal constitutional grounds); *Zant v. Stephens*, 456 U.S. 410 (1982) (clarification of state's premises for applying death sentence necessary to determine whether sentence was an unconstitutional, cruel and unusual punishment); *Massachusetts v. Feeney*, 429 U.S. 66 (1976) (state issues of whether state attorney general was authorized to bring suit could avoid Supreme Court's need to determine case on federal constitutional grounds); *Bellotti v. Baird*, 428 U.S. 132 (1976) (certification of issue regarding

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7 Similarly, Judge Susan Black, joining in the court of appeals' decision, was a former Florida circuit court judge, as well as federal district court judge for the Middle District of Florida.

state abortion statute necessary to avoid federal constitutional issue under *Pullman* abstention doctrine); *Aldrich v. Aldrich,* 375 U.S. 249 (1963) (certification of validity of divorce provision necessary in order to assess full faith and credit claims); *cf. Kaiser Steel Corp. v. W.S. Ranch Co.,* 391 U.S. 593 (1968) (certification of state law issues not involved; only federal court abstention). In contrast, in the instant case, the state law issues have absolutely no connection to any federal constitutional issues, so there is no need for this Court to certify state law issues to determine or avoid determining a federal constitutional issue.

Since *Lehman Brothers,* this Court has not found it necessary to again remind the circuit courts of appeals about the state certification process. Indeed, the former Fifth Circuit has developed precedent, binding in the Eleventh Circuit, guiding the court of appeals' exercise of its discretion in certifying an issue to a state supreme court.[8] The factors to be considered were set out in *Florida v. Exxon Corp.,* 526 F.2d 266, 274-76 (5th Cir.), *cert. denied,* 425 U.S. 930 (1976), as follows:

> In determining whether to exercise our discretion in favor of certification, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law—statutes, judicial decisions, attorney general's opinions—to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical

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8 *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting as binding precedent former Fifth Circuit decisions prior to October 1, 1981).

> limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

Id. at 274-75 (footnotes omitted). The Eleventh Circuit expressly followed these factors in *Smigiel v. Aetna Casualty & Surety Co.*, 785 F.2d 922, 924-25 (11th Cir. 1986), specifically acknowledging the requirements of *Lehman Brothers.*[9]

Additional factors also support the court of appeals' exercise of its discretion not to certify the state law issues in this case. As was noted in *Florida v. Exxon,* the certification process can cause up to two (2) years delay, plus additional expense. Since the central dispute in this case began over ten (10) years ago, the Eleventh Circuit reasonably determined not to certify issues in this case which would cause even further delay in this case's disposition. Likewise, any concern over comity with the state courts, which was slight in the circumstances of interpreting this statutory scheme, was certainly given due consideration by Judge Rosemary Barkett, former Chief Justice of the Florida Supreme Court.

Contrary to Mercedes-Benz's assertions, the Eleventh Circuit did not "refuse" to certify any state law issues since Mercedes-Benz never requested, even on rehearing, that any issue be certified to the state supreme court. Indeed, Mercedes-Benz's suggestion in its petition to this Court is the first time it has raised this issue. Nevertheless, the panel

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9 The Eleventh Circuit makes frequent use of the certification procedure and has certified issues to the Florida Supreme Court as recently as this year. *See Mosher v. Speedstar, Inc.*, 52 F.3d 913, 917 (11th Cir. 1995) (espousing the usefulness of the certification process). Indeed, the current concern is the possible overuse of the certification procedure, leading to recent suggestions to limit its use. *See* G. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification,* 47 ARK. L. REV. 305 (1994).

of the Eleventh Circuit raised this issue itself at oral argument, and obviously considered and rejected certification, which was suggested by the dissenting judge.

The court of appeals properly exercised its discretion based on the straightforward nature and lack of closeness of the questions, as well as the non-dispositive character of the state law issues.[10] Based on these factors, as well as the needless delay and costs certification would create, there is no valid basis for concluding that the court of appeals abused its discretion by not certifying easily determined issues to the Florida Supreme Court.

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10 Additionally, the Florida Supreme Court had already denied review of the decision of the First District Court of Appeal which specifically held that Mercedes-Benz could only challenge the MSP-Taylor dealership transfer on the basis of the transferee's qualifications. *Mercedes-Benz*, 561 So.2d 620 (Fla. 1st Dist. Ct. App.), *review denied*, 574 So.2d 142 (Fla. 1990).

CONCLUSION

Based on the foregoing, there is certainly no real and embarrassing conflict between the court of appeals' decision in this case and decisions of this Court or other circuit courts which justify the Court's granting a petition for writ of certiorari. Likewise, there is no valid basis to conclude that the court of appeals abused its discretion in not certifying easily determined state law issues to the state supreme court. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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November, 1995

No. 95-590

IN THE

Supreme Court of the United States

October Term, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Petitioner,

v.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC., AND BILLY GRUBBS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPENDICES

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MERCEDES-BENZ OF NORTH AMERICA, a Florida corporation, Appellant/Cross-Appellee,

v.

MIKE SMITH PONTIAC GMC, INC., a Florida corporation, Appellee/Cross-Appellant,

v.

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Appellee.

MERCEDES-BENZ OF NORTH AMERICA, INC., Appellant,

v.

MIKE SMITH PONTIAC GMC, INC., Jerome Z. Ginsburg, Ronald Cutler, Terry Taylor, Billy R. Grubbs, Terry Taylor Investments, Inc., and Department of Highway Safety and Motor Vehicles, Appellees.

Nos. 87-2041, 87-2042.

District Court of Appeal of Florida, First District.

May 3, 1990.

Rehearing Denied June 14, 1990.

MINER, Judge.

This case involves consolidated appeals and a cross appeal from two final orders of the Department of Highway Safety and Motor Vehicles (Department). In Case No. 87-2042, the Department dismissed with prejudice appellant's complaint which sought to prevent a proposed transfer in ownership of an automobile dealership. In Case No. 87-2041, the Department dismissed as moot an action brought by appellee which challenged appellant's termination of appellee's franchise. We affirm.

In July 1983, appellant, Mercedes-Benz of North America (MBNA), and appellee, Mike Smith Pontiac GMC, Inc. (MSP), entered into a Mercedes-Benz Passenger Car Dealer Agreement, which permitted MSP to sell and service Mercedes-Benz automobiles. When it expired on December 31, 1983, a new agreement was entered into to cover the two-year period from January 1, 1984 through December 31, 1985. Paragraph 15D(g) of the agreement provided as follows:

> D. Dealer [MSP] and MBNA agree that the following acts or events, all within the control of the Dealer or originating from actions taken by Dealer or its management or owners, are so contrary to the spirit and purposes of this Dealer Agreement as to warrant its termination:
>
> ....
>
> (g) Any disagreement between or among the Dealer Operators or Owners of Dealer which in MBNA's opinion may adversely affect the conduct of Dealer's business or the interests of MBNA, providing the disagreement continues three (3) months after notice to Dealer by MBNA that the disagreement must be resolved.

In the summer of 1985 MBNA became aware of a dispute between MSP's dealer- operator and primary dealer-owner.[1]

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1 This dispute culminated in the ouster of the dealer-operator, Michael Smith, by the primary dealer-owner, Jerome Ginsburg. Apparently, Ginsburg owned seventy-five percent of MSP's stock, and held stock transfer documents executed in blank by Smith for the remaining twenty-five percent. Ginsburg also possessed undated letters of resignation executed by Smith. When Ginsburg used these documents to oust Smith in June 1985, Smith sought injunctive relief in Circuit Court for Volusia County. See *Mike Smith Pontiac, GMC, Inc. v. Smith,* 486 So.2d 89 (Fla. 5th DCA 1986).

By letter dated July 1, 1985, MBNA invoked Paragraph 15D(g) and advised MSP to resolve its management dispute within ninety days or face possible termination of the franchise agreement. By October 23, the ninety day period had expired, and MBNA sent a letter informing MSP that insufficient progress had been made in resolving the management dispute. The letter, which was signed by a Vice President of MBNA, charged breaches of various provisions in addition to Paragraph 15D(g), and concluded as follows:

> Therefore, in conformity with the Florida Franchise Practices Act, we hereby inform you of our intent to terminate your Mercedes-Benz Passenger Car Dealer Agreement on January 31, 1986 which is at least 90 days hence from the order to provide sufficient notice to affect the termination of the Agreement, we will extend the Dealer Agreement until January 31, 1986. This notice and extension is pursuant to the provisions of Paragraphs 15 and 16 of the Mercedes-Benz Passenger Car Dealer Agreement.[2]

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2 Paragraph 16 of the dealer agreement provides for the extension or renewal of the agreement:

> This Agreement can be extended or renewed only through an express written instrument to that effect and only if such instrument is duly executed on behalf of MBNA by [the President or a Vice President]. Any business relations of any nature whatsoever between MBNA and Dealer after the expiration of this Agreement or after its prior termination pursuant to Paragraph 15 of this Agreement, without such written extension or renewal shall not operate as an extension or renewal of this Agreement. Nevertheless, all such business relations, so long as they are continued, shall be governed by terms identical with the provisions of this Agreement.

On January 16, 1986, MSP filed an administrative complaint with the Department pursuant to section 320.641, Florida Statutes (1985), alleging unfair termination of the dealer agreement. Because the complaint was filed within the ninety day notice period, the dealer agreement continued in effect by operation of section 320.641(3), Florida Statutes (1985),[3] until the termination dispute was resolved.

In October 1986, prior to the final hearing, MSP proposed a transfer of the dealership to appellee, Ronald Cutler. On December 12, one week after the final hearing, MBNA informed MSP that it found Cutler an unacceptable transferee and would not approve the proposed transfer. On December 15, MBNA filed an administrative complaint to challenge the proposed transfer. Although section 320.643(2), Florida Statutes (1985), was the basis for the complaint, MBNA asserted that it was not required to comply with the statute because its dealer agreement with

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3 Section 320.641(3) provides as follows:

> Any motor vehicle dealer whose franchise agreement is discontinued, canceled, not renewed, modified, or replaced may, within the 90-day notice period, file with the department a verified complaint for a determination of whether such action is an unfair or prohibited discontinuation, cancellation, nonrenewal, modification, or replacement. Agreements and certificates of appointment shall continue in effect until final determination by the department of the issues raised in such complaint by the motor vehicle dealer, and, except pursuant to s. 320.643, no replacement motor vehicle dealer shall be named for this point or location to engage in business prior to the final adjudication by the department on the complaint.

Section 320.643, Florida Statutes (1985), establishes the procedure by which a dealer may transfer his franchise to a transferee who the manufacturer finds acceptable or, at least, does not find unacceptable.

MSP was executed prior to the statute's enactment. According to MBNA, the existing agreement was executed on January 1, 1984, and was therefore not subject to section 320.643(2) which came into effect on May 31, 1984. The hearing officer stayed MBNA's transfer challenge pending the outcome of MSP's termination proceeding.

The hearing officer issued his recommended order in the termination action on May 1, 1987. MBNA was justified in terminating the dealership based upon the management dispute within MSP. Apparently, negotiations had been ongoing between MBNA, MSP and the proposed transferee, because shortly after issuance of the recommended order MBNA filed a notification of status in its transfer challenge; according to MBNA, a transfer had been approved on modified terms, and its transfer challenge would become moot upon closing of the sale.

However, in June 1987, MSP informed MBNA that the proposed transfer would not take place; instead, MSP proposed a new transfer to appellees Terry Taylor, Billy Grubbs, and Terry Taylor Investments.[4] On August 28, 1987, MBNA, having previously abandoned its challenge to the Cutler transfer, filed a new complaint challenging the Taylor transfer. Again, MBNA's complaint was filed pursuant to section 320.643(2), and again, MBNA asserted that the statute could not be applied to its agreement with MSP. The complaint, which was verified by MBNA's President, did not allege that the Taylor transferees were unqualified, nor did it explain why MBNA found them unacceptable. In addition, the verification, which was required by section 320.643(2), merely stated: "I have read the above Complaint and, to the best of my knowledge, the allegations are true

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4 This caused Cutler to bring an action against MSP and its dealer- owner, Jerome Ginsburg, seeking specific performance of the sale agreement between Cutler and MSP.

and correct." MSP responded with a motion to dismiss the complaint for its failure to challenge the qualifications of the proposed transferees, and for the inadequacy of the verification.

On November 9, 1987, the Department granted MSP's motion on the grounds asserted therein, and dismissed MBNA's complaint with prejudice. In addition, the Department entered a final order dismissing MSP's termination action as moot. According to the Department, MBNA failed to file a proper transfer challenge within the sixty day period prescribed by section 320.643(2). Consequently, the MSP agreement was amended by operation of law and the Taylor transferees were now the holders of the MBNA franchise. This appeal ensued.

On appeal, MBNA argues that the Department based the dismissal of the transfer challenge upon certain provisions in section 320.643, Florida Statutes, which were not in existence at the time the parties executed the dealer agreement. MBNA points out that on January 1, 1984, when the two-year extension of the agreement became effective, there was no requirement that a licensee[5] file a verified complaint in order to prevent a proposed transfer of the dealership. Rather, it was sufficient that the licensee inform the dealer in writing within sixty days of notice of the proposed transfer, that the proposed transferee was unacceptable. Although the licensee was required to provide "material reasons" for rejecting the transferee, and acceptance could not be withheld unreasonably, it was nowhere required that the licensee justify

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5 Within the context of Florida's dealer protection scheme, a "licensee" includes the manufacturers, distributors and importers that are required to be licensed by the Department in order to have their vehicles sold in this state. See §§ 320.60(8) and 320.61, Fla.Stat. (1985). MBNA is included within this definition.

its rejection by making reference to the particular shortcomings in the transferee's character or business experience. *See* § 320.643, Fla.Stat. (1983). According to MBNA, the application of amended section 320.643 constituted an impairment of the dealer agreement in violation of the Florida Constitution, the U.S. Constitution, and section 320.701, Florida Statutes (1985).[6] MBNA further argues that even if the amendments are found applicable, its complaint was properly verified and provided valid grounds for challenging the proposed transfer.

The main issue on appeal concerns the applicability of the extensive amendments in chapter 84-69, Laws of Florida, to the dealer agreement between MBNA and MSP. These amendments, which refined and particularized portions of Florida's dealer protection scheme, provided a procedure through which a licensee could challenge a proposed transfer. As amended, section 320.643(2)(a), Florida Statutes (1985), requires that licensees be notified of a proposed transfer, and further provides:

> A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that the proposed transferee is not a

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6 Section 320.701, Florida Statutes (1985), was included among the 1984 amendments to specifically address the question of applicability to existing franchise agreements. The statute provides as follows:

> This act applies to all presently existing or established systems of distribution of motor vehicles in this state, except to the extent that such application would impair contractual agreements in violation of the Florida Constitution or Federal Constitution. All agreements renewed or entered into subsequent to May 31, 1984, will be governed by this act.

> person qualified to be a transferee under this section.... If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order.

Ch. 84-69, § 8, Laws of Fla. The effective date of the amendments was May 31, 1984. Ch. 84-69, § 14, Laws of Fla.

MBNA correctly points out that the two-year extension of the dealer agreement predated the 1984 amendments. However, we agree with MSP that a further extension occurred in October 1985, when MBNA communicated its intent to terminate the franchise and extended the agreement for one month. Although we recognize that the extension was MBNA's means of providing the requisite ninety days notice prior to termination,[7] we note that this extension was accomplished pursuant to Paragraph 16 of the dealer agreement and was not merely an unspoken continuation of the franchise relationship. Because the dealer agreement was extended after the effective date of the amendments, application of the amended version of section 320.643 does not operate to impair MBNA's contractual rights.

We agree with the Department that MBNA's complaint did not meet the requirements of section 320.643(2)(a), Florida Statutes (1985). The transfer challenge envisioned

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7 See § 320.641(1)(a), Fla.Stat. (1983).

in this section must allege that the proposed transferee is not qualified under the terms of the statute. The only "qualifications" referred to in section 320.643 are the transferee's moral character, and ability to meet any reasonable and uniformly applied standard of the licensee relating to business experience.[8] In the instant case, MBNA's complaint was silent as to the qualifications of the Taylor transferees. In fact, the only basis for MBNA's complaint was its fear that Cutler, the first-proposed transferee, would successfully force a transfer under the original transfer agreement.[9] Since this is not a proper basis for a transfer challenge, the Department correctly dismissed the complaint. The complaint's verification, which was conditional and therefore inadequate, constituted further grounds for dismissal. *See United Bonding Insurance Co. v. Dura-Stress, Inc.*, 243 So.2d 244 (Fla. 2d DCA 1971). Although MBNA filed an amended complaint with proper verification, the complaint remained deficient in failing to challenge the qualifications of the proposed transferees. In addition, the amended complaint was not submitted until after the time for filing had expired and the final order of dismissal had been entered.

MBNA also asserts that the termination action was improperly dismissed as moot based upon the Department's mistaken belief that a proposed transfer must preempt ongoing termination proceedings. According to MBNA, the law does not lend such deference to transfers. MBNA argues

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8 Although the notice of transfer must include information on the transferee's financial qualifications, a transferee's lack of finances is not mentioned as a basis for the licensee's withholding acceptance under subsection 1 or for bringing a challenge under subsection 2. We do not offer an opinion as to whether or under what circumstances financial qualifications constitute fertile grounds for challenge under section 320.643.

9 See note 4, infra.

that such a result would make termination a dead letter because any attempted termination would be subject to indefinite and seemingly limitless delay as the dealer could propose a succession of transfers.

We disagree with MBNA, and find that the Department was not required to proceed with the termination action in the face of an impending transfer. When a licensee challenges a proposed transfer under section 320.643, the franchise agreement is preserved until the matter is resolved; the Department is required to expedite the transfer challenge. *See* § 320.643(2)(b), Fla.Stat. (1985). Even if the dealer has already invoked section 320.641(3) to contest an attempted termination of the franchise agreement, the termination statute clearly envisions that a transfer under section 320.643 can take place. The termination statute provides that a replacement dealer can be named under section 320.643 in the midst of termination proceedings. Thus, the Department correctly dismissed the termination action as moot after the transfer took place by operation of law.

We also disagree with MBNA's assertion that there was material error in the Department's failure to issue a final order within ninety days of the recommended order. Shortly after issuance of the recommended order, MBNA filed its notification of status which announced that a transfer had been agreed upon and the termination action would shortly become moot. The resulting delay was necessitated by the transfer, and did not impair the fairness of the termination proceedings or the correctness of the action. *See Department of Transportation v. Courtelis Co.,* 436 So.2d 92 (Fla.1983); *Department of Business Regulation v. Hyman,* 417 So.2d 671 (Fla.1982); § 120.68(8), Fla.Stat. (1985).

Lastly, we find no merit in MSP's cross appeal, which asserts that the termination action should not have been dismissed as moot while its request for attorney's fees

remained to be resolved. The actual controversy in the termination action became moot with the transfer of the dealership. The mere possibility that MSP could eventually be awarded attorney's fees is an insufficient basis for continuing otherwise purposeless litigation.

In sum, we find that the Department correctly dismissed MBNA's flawed transfer challenge. A transfer then took place by operation of law, and the termination action was properly dismissed as moot. Thus, we affirm the Department's action.

SMITH, J., and FORD L. THOMPSON, Associate Judge, concur.

[1]320.643 Transfer, assignment, or sale of franchise agreements.—

(1) A motor vehicle dealer shall not transfer, assign, or sell a franchise agreement to another person unless the dealer first notifies the licensee of his decision to make such transfer, by written notice setting forth the prospective transferee's name, address, financial qualification, and business experience during the previous 5 years. The licensee shall, in writing, within 60 days after receipt of such notice, inform the dealer either of his approval of the transfer, assignment, or sale or of the unacceptability of the proposed transferee, setting forth the material reasons for the rejection. If the licensee does not so inform the dealer within the 60-day period, its approval of the proposed transfer is deemed granted. No such transfer, assignment, or sale will be valid unless the transferee agrees in writing to comply with all requirements of the franchise then in effect. Notwithstanding the terms of any franchise agreement, the acceptance by the licensee of the proposed transferee shall not be unreasonably withheld. For the purposes of this section, the refusal by the licensee to accept a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards, if any, of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers is presumed to be unreasonable.

(2)(a) Notwithstanding the terms of any franchise agreement, a licensee shall not, by contract or otherwise, fail or refuse to give effect to, prevent, prohibit, or penalize, or attempt to refuse to give effect to, prevent, prohibit, or penalize, any motor vehicle dealer or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest therein from selling, assigning, transferring, alienating, or otherwise disposing of, in whole or in part, the equity interest of any of them in such motor

vehicle dealer to any other person or persons, including a corporation established or existing for the purpose of owning or holding the stock or ownership interests of other entities, unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not, or whose controlling executive management is not, of good moral character. A motor vehicle dealer, or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest in the motor vehicle dealer, who desires to sell, assign, transfer, alienate, or otherwise dispose of any interest in such motor vehicle dealer shall notify, or cause the proposed transferee to so notify, the licensee, in writing, of the identity and address of the proposed transferee. A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that the proposed transferee is not a person qualified to be a transferee under this section. The licensee has the burden of proof with respect to all issues raised by such verified complaint. The department shall determine, and enter an order providing, that the proposed transferee either is qualified or is not and cannot be qualified for specified reasons; or the order may provide the conditions under which a proposed transferee would be qualified. If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order.

(b) During the pendency of any such hearing, the franchise agreement of the motor vehicle dealer shall continue

in effect in accordance with its terms. The department shall expedite any determination requested under this section.

History.—s. 7, ch. 80-217; s. 2, ch. 81-318; s. 8, ch. 84-69.

[1]**Note.**—Repealed effective October 1, 1998, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

[1]**320.697 Civil damages.**—Any person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of ss. 320.60-320.70, notwithstanding the existence of any other remedies under ss. 320.60-320.70, has a cause of action against the licensee for damages and may recover damages therefor in any court of competent jurisdiction in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee to be assessed by the court. Upon a prima facie showing by the person bringing the action that such a violation by the licensee has occurred, the burden of proof shall then be upon the licensee to prove that such violation or unfair practice did not occur.

History.—s. 17, ch. 70-424; s. 3, ch. 76-168; s. 96, ch. 77-104; s. 1, ch. 77-457; ss. 16, 17, ch. 80-217; ss. 2, 3, ch. 81-318; s. 11, ch. 84-69.

[1]**Note.**—Repealed effective October 1, 1988, by s. 2, ch. 81-318, and scheduled for review pursuant to s. 11.61 in advance of that date.

No. 95-590 (3)

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Petitioner,

vs.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC. and BILLY GRUBBS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT MIKE SMITH PONTIAC, GMC, INC.

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

As presented by Mercedes-Benz of North America, Inc., the issues contain argument and unnecessary detail, prohibited by Supreme Court Rule 14.1.(a). Without admitting that there are any issues worthy of consideration for certiorari, Respondent Mike Smith Pontiac, GMC, Inc. suggests the following is a more appropriate statement of the questions Mercedes attempts to raise:

1. Whether the First Amendment and the *Noerr-Pennington* doctrine render unconstitutional a Florida statute which imposes liability for damages upon an automobile manufacturer for unlawfully preventing one of its franchised dealers from transferring its franchise to a qualified purchaser.

2. Whether the Eleventh Circuit abused its discretion by resolving questions of Florida law based on the "clear and unambiguous" language of a Florida statute rather than certifying those questions to the Florida Supreme Court.

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APPENDIX

Appendix A — Excerpts from Eleventh Circuit Brief 1a

SUMMARY OF ARGUMENT

Reduced to its essence, this case presents only state law issues having no importance to anyone but the parties to this case. Mercedes-Benz of North America, Inc. ("Mercedes"), has been found to have violated Florida law by improperly obstructing the sale of the Mercedes dealership owned by Respondent Mike Smith Pontiac, GMC, Inc. ("MSP")[1] to a buyer whom even Mercedes admitted was qualified to be a Mercedes dealer. Mercedes did so despite the entry of final state administrative orders requiring Mercedes to permit the transfer. Mercedes attempted to give excuse and cover to its illegal actions by filing a complaint with the Florida Department of Highway Safety and Motor Vehicles ("DMV"), the agency assigned the responsibility for enforcing the Florida law at issue, seeking a declaration that Mercedes' actions were lawful even though the Florida statutes clearly prohibited Mercedes' actions.

The DMV dismissed the complaint as improper and ordered Mercedes to permit the sale. After Mercedes refused to obey the DMV's order, the state courts of Florida affirmed that Mercedes' actions were not proper and violated the Florida law. In so doing, the court said that Mercedes' stated reasons for preventing the transfer were "not a proper basis for a transfer challenge." *See Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So. 2d 620 (Fla. 1st Dist. Ct. App. 1990), *reh. denied*, 574 So. 2d 142 (Fla. 1990).

This is not a case to which the *Noerr-Pennington* doctrine has any remote application. Mercedes unlawfully prevented the transfer of MSP's franchise to an admittedly qualified buyer on grounds prohibited by Florida law and failed to file a permitted, legally sufficient objection to the proposed transfer. Mercedes' numerous acts over the last decade in preventing the sale did not

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1. MSP has no parent or subsidiary companies.

constitute petitioning activity and were not protected by the First Amendment, but rather, violated the clear and unambiguous statutory mandate that manufacturers such as Mercedes not prevent such transfers *unless* there is a valid objection to the buyer's qualifications. Mercedes' putative constitutional issue does not relate to the facts of this case, and the Eleventh Circuit Court of Appeals thought so little of the argument that it did not even mention the issue in its opinion.

Further, no federal issue is raised by this case and there is no conflict justifying review, particularly in view of the fact that the issue was not even discussed by the Eleventh Circuit in its opinion, or when Mercedes sought a rehearing *en banc*. Moreover, the Eleventh Circuit did not abuse its discretion by deciding state law issues in light of the clear and unambiguous language of a Florida statute, rather than certifying them to the Florida Supreme Court, particularly where Mercedes never sought certification in the proceedings below and the state law issues have no constitutional or federal impact.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI IS NOT WARRANTED TO REVIEW WHETHER THE FIRST AMENDMENT AND THE *NOERR-PENNINGTON* DOCTRINE RENDER UNCONSTITUTIONAL A FLORIDA STATUTE WHICH IMPOSES LIABILITY FOR DAMAGES UPON AN AUTOMOBILE MANUFACTURER FOR UNLAWFULLY PREVENTING ONE OF ITS FRANCHISED DEALERS FROM TRANSFERRING ITS FRANCHISE TO A QUALIFIED PURCHASER.

Mercedes' Petition in this case omits and misstates material facts and the applicable law in an attempt to persuade this Court

to grant a writ of certiorari to consider First Amendment and *Noerr-Pennington* issues that do not exist in this case.[2] As will hereafter be shown, the facts of this case do *not* give rise to application of the *Noerr-Pennington* doctrine, and do *not* present a federal issue of any kind, much less the constitutional issue Mercedes attempts to fashion. A chronological recitation of the facts and evidence in this complex, fact-bound, decade long litigation is excerpted from MSP's Initial Brief before the Eleventh Circuit and attached hereto as Appendix "A." This brief will only deal with those facts relevant to the issues Mercedes claims merit a grant of certiorari by this Court and will include necessary facts that Mercedes omitted or misstated to mislead this Court.

A. The Opinion Below Does Not Involve First Amendment or *Noerr-Pennington* Issues, But Only Issues of Florida Law.

Mercedes' request for issuance of a writ of certiorari is based upon Mercedes' specious claim that its actions in preventing the sale of MSP's dealership were merely an exercise by Mercedes of its right of free speech under the *Noerr-Pennington* doctrine. Mercedes claims that the opinion of the Eleventh Circuit is inconsistent with and conflicts with the opinion of other circuit courts on the proper application of the *Noerr-Pennington* doctrine. This ground is a total fabrication. Factually, since there were no First Amendment or *Noerr-Pennington* issues present in this case, the Eleventh Circuit predictably never addressed these nonexistent issues in its opinion.

Lacking an opinion necessary to create conflict between

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2. Mercedes even redacts key language from its compilation of the statutes, including language that prohibits a manufacturer from modifying the dealer's rights by contract and language giving transfer proceedings priority over termination proceedings. *See* § 320.643(2), Fla. Stat. (1985).

circuits, Mercedes created both the opinion and the conflict out of whole cloth. Mercedes cites part of one sentence from one of MSP's briefs below and then unilaterally concludes that this "phrase" was the basis of the Eleventh Circuit's rejection of Mercedes' purported First Amendment argument. Petition, p. 17. Mercedes then, without any logical basis, misinterprets the "phrase" to say that *Noerr-Pennington* does not apply except to anti-trust cases, and concludes that this is what the Eleventh Circuit held when, in reality, the Eleventh Circuit did not. Mercedes offers this misinterpretation of part of a sentence from one of MSP's briefs as a basis for the United States Supreme Court granting certiorari, even though there is not one word in the Eleventh Circuit's opinion about *Noerr-Pennington* or the First Amendment.

On appeal, the panel[3] of the Eleventh Circuit that considered the case utilized its entire opinion to discuss issues of Florida statutory and common law. *See Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 32 F.3d 528 (11th Cir. 1994). Although it had the advantage of full briefs by all parties, oral argument before the panel, and access to the record on appeal, the Eleventh Circuit did not even mention as noteworthy in its eight (8) page published opinion the issues that Mercedes asserts to this Court are of such import that a writ of certiorari is warranted.

Even the dissent did not mention those issues,[4] dealing

3. The case was heard by 3 judges, 2 of whom are resident in Florida: Circuit Judge Susan Black (former Florida Circuit Court Judge and Federal District Court Judge from the Middle District of Florida), Circuit Judge Rosemary Barkett (former Chief Justice of the Supreme Court of Florida), and Senior Circuit Judge James C. Hill.

4. Mercedes disingenuously characterizes Judge Hill's separate opinion as a "strong dissent." Petition, p. 11. Judge Hill did not even mention (Cont'd)

instead only with whether some of the Florida law questions could be certified to the Supreme Court of Florida for resolution. *See Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 32 F.3d 528, 535 (11th Cir. 1984) (Hill, Senior Circuit Judge, dissenting).[5] After the Circuit Court of Appeals had rejected Mercedes' arguments based on the "clear and unambiguous" language of the Florida statutes, Mercedes filed a Petition for Rehearing and Suggestion of Rehearing *En Banc* that did not warrant a request by even one of the twelve judges on the Eleventh Circuit for a poll on whether a rehearing *en banc* should be granted.[6]

In fact, Mercedes itself did not even claim that *Noerr-Pennington* had any application to this case until very late in the trial court proceedings. *See, e.g.*, R7-118 (a crucial Mercedes' filing not even mentioning *Noerr-Pennington* or the First Amendment). Therefore, this argument was waived. *Cf. Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988).

As a result, there is no basis for Mercedes' illusory First Amendment or *Noerr-Pennington* defenses. A review of the opinion below demonstrates a complete absence of any "conflict" with any other opinion of any court whatsoever, since the Eleventh Circuit rendered no decision and said absolutely

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(Cont'd)
Mercedes' *Noerr-Pennington* argument, and stated that his dissent was "not to take issue with the Court's result or to offer a contrary resolution." *See* MBNA Appendix B, p. 16a.

5. Neither Mercedes nor any other party ever requested certification of those issues to the Florida Supreme Court at any stage of the proceedings below. *See* the discussion of Issue 2, below.

6. *See* MBNA Appendix A, p. 2a.

nothing at all in its opinion regarding the First Amendment or *Noerr-Pennington*. The Eleventh Circuit did not even mention that the issue had been raised, much less state that it had any applicability.[7] Mercedes' Petition does not and cannot cite one statement by the Eleventh Circuit that creates a conflict or could create any confusion among circuits with respect to these issues, much less demonstrate a "real and embarrassing conflict" that this Court's standards require for issuance of a writ of certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). If a conflict truly existed on the issue, Mercedes should be able to point to the conflicting language in the opinion.

Supreme Court Rule 10 provides guidance to those seeking to understand this Court's exercise of its judicial discretion in granting review under its *certiorari* jurisdiction. Rule 10.1 advises that "[a] petition for a writ of certiorari will be granted *only* when there are *special* and *important* reasons therefor." (emphasis supplied). That Rule further describes the "character of reasons" which this Court considers when exercising its discretion. *None* of the circumstances addressed are found in the instant case. No special and important public issue of federal

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7. *See Costle v. Pacific Legal Foundation*, 445 U.S. 198, *reh. denied*, 446 U.S. 947 (1980), wherein this Court responded to an argument that:

> This argument was not addressed directly by the Court of Appeals. It would be appropriate, therefore, for this Court not to attempt to resolve it here, even if we had an adequate record to do so.

Id. at 218. *See also Garner v. United States*, 424 U.S. 648 (1976), wherein this Court declined to consider the petitioner's argument, stating:

> [T]hese contentions were not deemed of sufficient merit to warrant discussion below. In these circumstances we consider it inappropriate to reach them.

Id. at 656, fn. 10.

law is involved in this fact-bound diversity dispute involving Florida law, and the absence of discussion of *any* federal issue of law in the Eleventh Circuit opinion demonstrates that very shortcoming in Mercedes' Petition.

B. Mercedes Omits and Misstates Material Facts and the Applicable Law in an Attempt to Obtain Certiorari for First Amendment and *Noerr-Pennington* Issues That Do Not Exist in This Case.

The purported facts that Mercedes claims are necessary to give rise to this defense are that at all times while Mercedes was preventing the transfer of the franchise to Taylor, it was subject to competing claims to the franchise by both Smith and Cutler; that Florida law, namely § 320.643, Fla. Stat. (1985), which limited Mercedes' right to reject a proposed transfer to the transferee's qualifications, allegedly imposed upon Mercedes liability to Smith and Cutler for damages if it approved the Taylor transfer; and that to protect itself from Smith and Cutler, Mercedes was compelled to file a complaint under § 320.643, Fla. Stat. (1985) with the DMV, seeking denial of the transfer to Taylor on grounds other than those specified in § 320.643, Fla. Stat. (1985). Mercedes claims that this complaint constituted a petition, and that by filing the complaint, Mercedes insulated itself from liability resulting from its refusal to permit the transfer to Taylor.

In addition, Mercedes misstates without any citation, "In any event, as the court of appeals expressly found, Mercedes certainly had no subjective intent to interfere with respondent's business relationships by bringing an administrative proceeding before the DMV." Petition, p. 16. **Nowhere did the Florida appeals court or the Eleventh Circuit make such a finding.** Indeed, the record supports a contrary conclusion. The record shows that Mercedes engaged in an extended pattern of conduct lasting more than seven (7) years, going far beyond speech activities, and ending in Mercedes' unlawful refusal to permit

MSP to sell its dealership and transfer its Mercedes franchise to Terry Taylor ("Taylor"). *See* Appendix "A" for identification of Taylor. The obvious purpose of this conduct was to harm MSP, as shown by the simultaneous efforts by Mercedes to terminate MSP's franchise.[8] Mercedes attempts to justify its numerous violations of MSP's rights by claiming it acted solely to protect itself from being sued by two persons who are not parties to this case, Smith and Cutler. *See* Appendix "A" for identification of these individuals. However, as shown below, the record does not support Mercedes' claim.

It was Mercedes that falsely advised Smith that Smith—not MSP—was the owner of the franchise and it was this act that caused Smith to initiate his claim. R25-155. Further, Mercedes fails to state that in April 1986, a year and one half before Mercedes rejected the transfer to Taylor, the Florida Fifth District Court of Appeal ruled that the franchise was owned by MSP—not Smith. The Florida appeal court further held that Smith was at best an employee at will and that if he had any claim against MSP, it was solely for monetary damages. R25-178 - R25-182; MSP Ex. 30 (*See also Mike Smith Pontiac, GMC, Inc. v. Smith,* 486 So. 2d 89 (Fla. 5th Dist. Ct. App. 1986)). Smith never appealed that decision, and Mercedes fails to mention that at no time thereafter did Smith claim that he owned the franchise, nor did he, in fact, ever object to the transfer to Taylor. In disregard for the facts, however, Mercedes continued to claim, as it does today, that Smith—not MSP—was the owner of the franchise and Mercedes

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8. During that entire period of time, Mercedes also refused to deal with MSP in a fair manner, refusing to change the address and phone number for the dealership in its directory after it moved [R34-139]; deliberately sending its mail to the wrong address [R34-139]; refusing to make its personnel available to deal with warranty claims on a regular basis, as it did for its other dealers [R34-146 & 147]; refusing to provide floor plan financing [R26-302; R26-229; R38-120]; refusing to sell parts, except on a COD basis [R34-40 & 138]; and refusing to permit MSP to participate in normal promotions and programs, including its used car program. R34-146 & 147.

continued to rely upon Smith's court-rejected claim as a subterfuge for its unlawful acts in preventing the transfer to Taylor.

The situation is similar with respect to Mercedes' allegations of Cutler's claim. There was no issue that Cutler defaulted on his contract. Contrary to Mercedes' Statement of Facts, MSP notified Mercedes that Cutler had committed a "default" [MBNA Ex. 559]—not that it was "revoking the transfer to Cutler," as misstated by Mercedes at Petition, p. 8. Mercedes acknowledged the default in its letter to MSP dated July 8, 1987, wherein Mercedes represented to MSP in writing that it would "no longer consider" the Cutler transaction but that it would instead consider only the Taylor transfer. MBNA Ex. 74. While Mercedes does state that Cutler, in an attempt to obtain return of his deposit, filed motions for an injunction with the Florida Department of Administrative Hearings (DOAH) and the Florida Circuit Court, it omits to disclose that *prior* to Mercedes' rejection of the Taylor transfer, the DOAH denied Cutler's motion for injunctive relief. MSP Ex. 88. Likewise, the Florida Circuit Court denied Cutler's motion for an injunction, and directed the transfer to Taylor to proceed. R34-106 & 107.[9]

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9. Mercedes also claims it executed a franchise agreement with Cutler. Petition, p. 8. Even though Mercedes did not claim this as grounds for objecting to Taylor at the time, it apparently now claims this fact excuses its misconduct. However, this is merely an additional violation of MSP's rights since the transaction with Cutler had not closed. R34-52. Also, contrary to Mercedes' claim, Mercedes' own witnesses testified that this franchise agreement was contingent upon Cutler closing. R29-245. Mercedes further misstates that MSP fired its manager and gave control of the dealership to Cutler. Petition, p. 8. That is not true [*see, e.g.*, MSP Ex. 239 & MBNA Ex. 559, both acknowledging that Mercedes was still doing business with MSP], and Mercedes' own citation evidences more an effort by its trial counsel to put words in the witness' mouth than support for the statement. The witness stated that his employment terminated February 1, 1987, months before Cutler was approved [R32-41], and that he did not know what happened after that point. R32-61.

Also omitted by Mercedes is the fact that the transfer of the three other franchises did close, and they were transferred to Taylor. R34-124. The other three manufacturers saw no problem with the transfer; they approved the transfer, and none of them were sued by either Smith or Cutler. R26-300. Only Mercedes refused to approve Taylor.

Nor is there any factual issue that Mercedes' rejection of the transfer to Taylor was malicious and had nothing to do with the alleged claims by Smith and Cutler, as Mercedes claimed. Cutler ultimately settled his lawsuit against MSP by giving up his $425,000 deposit [R27-32], and paying even more money ($37,000 [R26-341]) to cover MSP's legal fees. R34-150. Also, Cutler provided a letter informing Mercedes that he gave his "unconditional consent" to the transfer to Taylor. MSP Ex. 141. Cutler dismissed his lawsuit against MSP with prejudice. R24-310. Furthermore, in an unsuccessful attempt to get Mercedes to approve Taylor, MSP settled with Smith and provided to Mercedes an affidavit from Smith stating that he had no objection to the transfer to Taylor. MSP Ex. 145. Mercedes' response was to inquire why MSP thought these consents would affect Mercedes' position. MSP Ex. 146. Mercedes continued to prevent the transfer despite the fact that even its improper and continued excuse for preventing the transfer had now been eliminated.

When Mercedes' omissions are candidly disclosed to this Court and Mercedes' misstatements are corrected, it is clear that Mercedes had no lawful excuse for its conduct. Neither Smith nor Cutler were claiming any interest in the franchise during the period that Mercedes rejected the Taylor transfer. Even after MSP, in a vain attempt to obtain Mercedes' consent to the transfer, obtained both Smith's and Cutler's consent in writing to the Taylor transfer, Mercedes continued to reject the transfer, stating that Smith's and Cutler's alleged claims had nothing to do with its rejection of the transfer. MSP Ex. 146.

In addition, despite Mercedes' claim, §320.643, Fla. Stat. (1985) **imposes no liability** upon a manufacturer for approving a transfer of a franchise. It imposes liability only for illegally rejecting a transfer. The manufacturer's proper concern is not whether the dealer might somehow be violating someone else's rights by transferring the franchise to the wrong person, since the statute does not place the manufacturer in the position of protecting other person's rights. The manufacturer's only proper concern is whether the person to whom the franchise is being transferred is qualified to be a dealer. A manufacturer could approve two, three, or four proposed transferees without incurring any liability. The issue of who is entitled to compel a transfer of the franchise is a contract question involving only the parties to the contract for sale of the dealership. If MSP transferred the franchise to the wrong party, it would face liability for damages under its contract with the right party. However, Mercedes was not a party to those contracts; it was never faced with any potential liability for approving the transferee; and it had no issue on which to petition for relief or prevent the transfer from proceeding by refusing to accept the transferee.

In 1984, years prior to the proposed transfer to Taylor, the Florida District Court of Appeal advised Mercedes in the case of *Mercedes-Benz of North America, Inc. v. Department of Motor Vehicles,* 455 So. 2d 404 (Fla. 2d Dist. Ct. App. 1984), *reh. denied,* 462 So. 2d 1107 (Fla. 1985), that the **sole** basis under which it could reject a transfer was upon the qualifications of the proposed transferee. When the transfer to Cutler was initially proposed, General Motors rejected the transfer based on a position similar to that alleged by Mercedes, namely that the transfer of the franchise required Smith's consent. Its complaint under § 320.643, Fla. Stat. (1985) was dismissed by the Florida DMV for the reason that the only grounds for objecting to a transfer under § 320.643, Fla. Stat. (1985) was the lack of qualifications of the proposed transferee. R24-241 - R24-244; MSP Ex. 48; *see also* MSP Ex. 53, with attachment notifying

Mercedes of this dismissal. Subsequently, when Cutler attempted to enjoin the transfer to Taylor before the DOAH, Mercedes *itself* pointed out to the DOAH that an objection to a transfer under § 320.643, Fla. Stat. (1985) must be based solely upon the lack of qualifications of the proposed transferee! MSP Ex. 97. Yet, to prevent the transfer to Taylor, Mercedes objected to Taylor even though it has **admitted** that it had no objection to Taylor's qualifications. R29-205, R29-220, R29-300, R37-36 & 37.

Finally, Mercedes' argument that it was somehow compelled by the automatic transfer provisions of § 320.643, Fla. Stat. (1985) to file an administrative complaint is without merit. During the course of Mercedes' argument, the trial judge clearly and quickly pointed out the defect in this argument [R37-41 & 42], *i.e.*, if Mercedes genuinely had a concern about competing claims to the franchise, nothing in § 320.643, Fla. Stat. (1985) or the other provisions of the Automobile Dealer's Act foreclosed the use of a declaratory judgment action to obtain a judicial resolution of those claims without obstructing the transfer. Only the Florida courts, not the DMV, had jurisdiction to grant the relief Mercedes claims it was seeking. In addition to knowingly filing an improper administrative complaint under a statute that was restricted to resolving only one issue, the qualifications of the proposed transferee, and knowingly filing it before an administrative body which had no authority to entertain such an improper complaint or to challenge the validity of a state statute, Mercedes never properly verified its complaint, as required by the statute. MSP Ex. 182, p. 10. These facts were omitted by Mercedes because under federal law, Mercedes' use of an illegal process or procedure to prevent the transfer bars any claim by Mercedes for immunity from any damages, notwithstanding *Noerr-Pennington*.[10]

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10. *See, e.g., In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300 (8th Cir. 1985), *cert. denied*, 479 U.S. 1088 (1987), where the Eighth Circuit Court of Appeals stated that:

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Mercedes says in its Statement of Facts that in light of the alleged claims by Smith and Cutler, it did not know what to do, and that it joined Smith, Cutler, and Taylor as parties to its complaint under § 320.643, Fla. Stat. (1985) so that it could rely on the DMV's order in a proceeding in which all of the parties were bound. Petition, p. 9. However, Mercedes omits to state that when the DMV entered such an order telling Mercedes exactly what to do,[11] Mercedes refused to obey the order even though neither Smith nor Cutler appealed the DMV's order. R34-134. If, in fact, Smith and Cutler had been making claims to the dealership, which they were not, the DMV's decision foreclosed those claims. *See* MSP Ex. 121. In spite of that, however, Mercedes refused to comply with the DMV's order, and continued to reject the transfer to Taylor, still raising as the basis for its rejection the non-existent and/or barred claims by Smith and Cutler, and the liability to Smith and Cutler under § 320.643, Fla. Stat. (1985) that Mercedes invented to justify its actions. R34-132 - R34-134.

It is, therefore, clear from these omissions and misstatements that this case does not contain any First Amendment issues or petitioning claims, much less *Noerr-*

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> *Noerr-Pennington* does not immunize a defendant from liability for injuries resulting from governmental action secured by illegal means.

Id. at 1313.

11. The DMV ordered the transfer to proceed, stating that "The Complaint contained no allegation that the proposed transferees were not persons qualified to be transferees under 320.643, Florida Statutes," and "Because the Complaint does not raise the issues permitted to be raised by the § 320.643, F.S., it cannot be considered a complaint as contemplated by the statute." MSP Ex. 121.

Pennington concerns, since not one of the necessary facts Mercedes stated were the basis of its claim actually existed. It is because of the total lack of a factual basis for these claims that the First Amendment and *Noerr-Pennington* issues were not applicable and not addressed by any of the three judges sitting on the Circuit Court of Appeals, including the dissenting judge, and that none of the judges of the Circuit Court of Appeals felt that such an issue existed when Mercedes sought a rehearing *en banc*.

C. *Noerr-Pennington* Has No Application to This Case.

Mercedes itself did not even raise the *Noerr-Pennington* argument until very late in the trial court proceedings. *See, e.g.*, R7-118 (a crucial Mercedes' filing not even mentioning *Noerr-Pennington* or the First Amendment). As a result, this argument was waived and cannot now be interposed. *Cf. Yatvin v. Madison Metropolitan School District, supra.*[12]

Further, this Court has already ruled on several occasions that *Noerr*[13] and its progeny do not offer refuge from justice to those who violate the law, but protect only freedom of speech, which is in no way implicated by this case. In *California Motor*

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12. Also, Mercedes argued below that there were numerous subsidiary state law issues. The Eleventh Circuit had no difficulty using the "clear and unambiguous" language of the statute to dispose of the claimed subsidiary issues. However, Mercedes continues to claim that some of these issues warrant further review. While *none* of Mercedes' arguments are well-founded in any event, Mercedes' continued claim that there are other issues besides the putative constitutional issue makes it impossible for this Court to determine whether the putative constitutional issue is ripe for review by this Court, or whether after granting certiorari, this Court may be confronted with some unforeseen issue that prevents its review of the putative constitutional issue.

13. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, *reh. denied*, 365 U.S. 875 (1961).

Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), for example, this Court stated that:

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violated a valid statute.

Id. at 514. This Court also stated:

> First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" which the legislature has the power to control.

Id. at 515 (citation omitted).

The Florida Automobile Dealer's Act was designed to prevent a manufacturer from effectuating the abusive tactic of improperly preventing the dealer from selling its franchise by refusing to acquiesce in a proposed transfer for a reason other than those statutorily prescribed, *i.e.,* the proposed transferee's lack of qualifications or moral character. *See* Eleventh Circuit's opinion, MBNA Appendix B, p. 12a. The Act was intended to facilitate the transferability of the franchise since "[d]elaying this process and thus suspending the desired transfer can result in significant financial costs." *See* MBNA Appendix B, p. 12a. As a result, the Act clearly and precisely mandates that a manufacturer "shall not . . . fail or refuse to give effect to, prevent, prohibit, or penalize" any dealer from transferring a dealership for any reason other than the proposed transferee's lack of qualifications or moral character. *See* § 320.643, Fla. Stat. (1985).

Clearly, the Florida legislature has the power to restrict the grounds upon which an automobile manufacturer is permitted to

prevent its dealer from transferring that dealer's franchise. Just as clearly, the Florida legislature has the power to impose liability for damages upon any automobile manufacturer that violates those restrictions by refusing to permit a transfer for reasons that are *not* so authorized, but rather prohibited by law. The First Amendment does not preclude the Florida legislature from enacting such protection for automobile dealers, as has already been held by this Court in *California Motor Transport Co. v. Trucking Unlimited, supra.*

Contrary to Mercedes' argument, the Circuit Courts of Appeal have had no difficulty applying this principle.[14] Mercedes relies heavily upon *Webb v. Fury,* 282 S.E. 2d 28 (W. Va. 1981) in its effort to show that there is a conflict in the case law. *Webb v. Fury* was not a circuit court decision, and in any event, it was subsequently overruled by the West Virginia Supreme Court in *Harris v. Adkins,* 432 S.E. 2d 549 (W. Va. 1993) as a result of this Court's opinion in *McDonald v. Smith,* 472 U.S. 479 (1985). Accordingly, even the non-applicable conflict that Mercedes attempts to show does not actually exist.

Further, in *In re IBP Confidential Business Documents Litigation,* 755 F.2d 1300 (8th Cir. 1985), *cert. denied,* 479 U.S. 1088 (1987), the Eighth Circuit rejected the argument in *Webb v. Fury* that any extension of *Noerr-Pennington* beyond the antitrust context "created blanket immunity for all activities that look like petitioning." *In re IBP Confidential Business Documents Litigation,* 755 F.2d at 1312. The court stated:

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14. In *In re IBP Confidential Business Documents Litigation,* 755 F.2d 1300 (8th Cir. 1985), *cert. denied,* 479 U.S. 1088 (1987), for example, the Eighth Circuit Court of Appeals stated that:

> [T]he first amendment affords no protection to illegal acts.

Id. at 1313.

> This limited extension of the *Noerr-Pennington* doctrine does not support the conclusion that one who seeks to influence governmental action escapes liability for any and all injuries inflicted in the course of genuine petitioning activity. Rather, it simply establishes that courts may not award compensation for the consequences of protected activity. Courts can and do award damages for injuries inflicted as a result of unprotected activity.

Id. at 1313. Mercedes' actions in refusing to recognize the transfer to Taylor do not even remotely resemble petitioning activity.

The fact that Mercedes may have filed extensive litigation does not excuse it from complying with the law while its lawsuits are pending.[15] Mercedes offers no authority whatever that contradicts this conclusion, and as previously mentioned, the Eleventh Circuit thought so little of Mercedes' argument that it

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15. *See, e.g., Commerce Tankers v. National Maritime Union*, 553 F.2d 793 (2d Cir. 1977), *cert. denied*, 434 U.S. 923 (1977), where the Second Circuit rejected the argument that the *Noerr-Pennington* line of cases insulated the defendant from antitrust liability arising out of attempts to prevent the sale of a vessel through litigation seeking to enforce a restraint-on-transfer clause in a collective bargaining agreement. The court stated that:

> those cases do not stand for the proposition that a group boycott that is illegal under the antitrust laws can be immunized from liability by a later law suit to enforce it. Indeed, the language in them indicates to the contrary.

Id. at 800.

did not even bother to discuss it, or even acknowledge that the argument had been made. Because it appears that only Mercedes is confused about this point, it is difficult for one to conclude that it is a matter of great importance for this Court to decide.

This Court has observed in the past that:

> [I]t is very important that we [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). While the instant case is of importance to the parties, the state law issues by which its outcome was determined do not justify a grant of certiorari by this Court.

II.

CERTIORARI IS NOT WARRANTED TO REVIEW WHETHER THE ELEVENTH CIRCUIT ABUSED ITS DISCRETION BY RESOLVING QUESTIONS OF FLORIDA LAW BASED ON THE "CLEAR AND UNAMBIGUOUS" LANGUAGE OF THE STATUTE RATHER THAN CERTIFYING THOSE QUESTIONS TO THE FLORIDA SUPREME COURT.

Mercedes also contends that the Eleventh Circuit erred by not certifying certain state law questions for decision by the Supreme Court of Florida. Mercedes states that these issues of state law were novel, even though virtually all of the issues had

been decided previously by the Florida courts,[16] and, in fact, one of them had been decided by the Florida courts in a case involving the very parties to this petition.[17] Indeed, the Eleventh Circuit panel that decided this case had no difficulty disposing of all of these state law issues by a common sense interpretation of the "clear and unambiguous" language of the statutes, which was consistent with the clearly enunciated public policy giving rise to these laws. MBNA Appendix B, pp. 8a, 14a.[18]

A. Mercedes Never Requested That the Eleventh Circuit Certify Any Issues to the Florida Supreme Court and May Not Now Make Such a Request for the First Time in Its Petition for Certiorari.

Neither Mercedes nor any other party to this case ever asked the Eleventh Circuit to certify any issue to the Supreme Court of Florida. Although one of the judges on the panel raised the issue at the oral argument, Mercedes did not argue at that time that the issues should be certified to the Supreme Court of Florida.[19] After

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16. *See, e.g. Bayview Buick-GMC Truck, Inc. v. GMC*, 597 So. 2d 887 (Fla. 1st Dist. Ct. App. 1992); *Mercedes-Benz of North America, Inc. v. Department of Motor Vehicles*, 455 So. 2d 404 (Fla. 2d Dist. Ct. App. 1984), *reh. denied*, 462 So. 2d 1107 (Fla. 1985).

17. *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So. 2d 620 (Fla. 1st Dist. Ct. App. 1990), *reh. denied*, 574 So. 2d 142 (Fla. 1990).

18. Even Judge Hill's separate opinion stated that his dissent was "not to take issue with the Court's result or to offer a contrary resolution." *See* MBNA Appendix B, p. 16a.

19. It is not at all clear that the Supreme Court of Florida would have had jurisdiction over these issues anyway. *See* Constitution of the State of Florida, Article V, Section 3(b)(6).

the Eleventh Circuit ruled against Mercedes on the merits of the appeal, Mercedes filed a motion for rehearing, but even in its motion for rehearing, Mercedes did *not* request that any issue be certified to the Supreme Court of Florida.

The first and only time that Mercedes has ever requested or suggested certification of these issues was in its petition for certiorari. Interestingly, Mercedes does not even contend in its petition for certiorari that those rulings on Florida law by the Eleventh Circuit were erroneous as a matter of Florida law. It would be difficult for Mercedes to make such a claim in view of the fact that the Florida courts have already ruled that Mercedes acted improperly.

Mercedes' belated argument that these issues should be certified to the Supreme Court of Florida is merely another attempt to delay and evade justice. Mercedes elected to allow the Eleventh Circuit to decide these state law issues without seeking certification, even when the matter was raised at oral argument. Having lost in the Eleventh Circuit, Mercedes now wishes to find some other court to reconsider the decision of these issues.

In his concurring opinion in *Lehman Brothers v. Schein,* 416 U.S. 386 (1974), Justice Rehnquist pointed out that the petitioners should have asked for certification earlier, stating that "petitioners seek to upset the result of more than two years of trial and appellate litigation on the basis of a point which they first presented to the Court of Appeals upon petition for rehearing." *Id.* at 393. Justice Rehnquist also emphasized "the considerable discretion of the federal court" in making these decisions (*Id.* at 394), and warned that certification often "entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court." *Id.* at 394.

The litigation between the parties to this Petition has been

going on for almost ten (10) years, five (5) of which have been in the federal courts. Mercedes *never* requested certification in the proceedings below, but now seeks to further delay the resolution of this matter, so that it can again brief and argue those issues before a different court. Those issues have already been adequately resolved by the Eleventh Circuit on the "clear and unambiguous" language of the statute, without procedural objection by Mercedes.[20]

B. The Eleventh Circuit Did Not Abuse Its Discretion by Resolving Questions of Florida Law Because There Was No Unclear Issue of State Law.

The discretionary certification issue does not merit a grant of certiorari. **There is no special and important public issue of federal law involved.** The circuit courts of appeal already uniformly recognize the wisdom of certifying state law issues to state courts where appropriate. In fact, the Eleventh Circuit has itself been a great user of certification, where its use is warranted.[21] Indeed, the law governing the use of certification is

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20. *See, e.g., Kosak v. United States,* 465 U.S. 848, 850, n. 3 (1984), holding that petitioner's argument would not be considered by the Supreme Court where petitioner did not present the argument to the court of appeals.

21. Some might argue it has certified state law issues *too* frequently. Just some of the reported cases it has recently certified to the Florida Supreme Court include *Mosher v. Speedstar Div. of AMCA Intern., Inc.,* 52 F.3d 913 (11th Cir. 1995); *Savona v. Prudential Ins. Co. of America,* 51 F.3d 230 (11th Cir. 1993); *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.,* 18 F.3d 1555 (11th Cir. 1994); *Legal Environmental Assistance Foundation, Inc. v. Brevard County, Fla.,* 10 F.3d 1579 (11th Cir. 1994); *Yanakakis v. Chandris, S.A.,* 9 F.3d 1509 (11th Cir. 1993); *Benitez v. Standard Havens Products, Inc.,* 7 F.3d 1561 (11th Cir. 1993); *FDIC v. Verex Assurance, Inc.,* 3 F.3d 391 (11th Cir. 1993); *Georgetown Manor, Inc. v. Ethan Allen, Inc.,* 991 F.2d 1533 (11th Cir. 1993); *Allstate Insurance Co. v. Prasad,* 991 F.2d 669 (11th Cir. 1993); *Dempsey v. United States,* 989 F.2d 1134 (11th Cir. 1993); *Miele v. Prudential Bache*

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well settled by already existing opinions of this Court, and there is no need for a grant of certiorari in this case. Further, the Eleventh Circuit's decision is in conformity with those already existing opinions of this Court.

In *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), this Court has stated that:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . . Its use in a given case rests in the sound discretion of the federal court.

Id. at 390-391.

The Eleventh Circuit obviously purposely decided not to certify the state law issues. MSP suggests that the issues raised by Mercedes were not certified because it was not appropriate to do so in view of the fact that with respect to the issues in question, the statutes were "clear and unambiguous." *See* MBNA Appendix B, pp. 8a, 14a.

As this Court stated in *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987):

> It would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law . . . As we have demonstrated, . . . this ordinance is neither ambiguous nor obviously

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Securities, 986 F.2d 459 (11th Cir. 1993); *LeCroy v. McCollam (In re McCollam)*, 955 F.2d 678 (11th Cir. 1992); and *Securities and Exchange Commission v. Elliott*, 953 F.2d 1556 (11th Cir. 1992). It certifies questions to other state supreme courts, as well. *See, e.g., Corporation of Mercer University v. National Gypsum Co.*, 832 F.2d 1233 (11th Cir. 1987).

> susceptible of a limiting construction. A federal court may not properly ask a state court if it would care in effect to rewrite a statute. We therefore see no need in this case to abstain pending certification.

Id. at 471 (footnotes and citations omitted).

The Eleventh Circuit had no difficulty disposing of the issues that were before it in this case. Indeed, the court stated quite emphatically that the language of the statutes in question was "clear and unambiguous," as was the legislative intent. As in *City of Houston, Texas v. Hill*, it would have been "manifestly inappropriate" for the Eleventh Circuit to certify these issues under these circumstances.

The cases cited by Mercedes do not support its request for certiorari. In most of the cases, the Court granted certiorari to review a constitutional issue, such as the constitutionality of a state statute, only subsequently to decide that it could not or should not do so without first having a definitive interpretation of unclear state law.[22] The Court did not in those cases grant certiorari just so that it could reverse a calculated decision of the circuit court not to certify issues of exclusively state law, as Mercedes asks the Court to do in this case. Nor are the other cases cited by Mercedes any more analogous to the instant case.[23]

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22. *See Bellotti v. Baird*, 428 U.S. 132 (1976); *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988); *Mills v. Rogers*, 457 U.S. 291 (1982); *Elkins v. Moreno*, 435 U.S. 647 (1978); *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207 (1960); *Aldrich v. Aldrich*, 375 U.S. 249 (1963); *Massachusetts v. Feeney*, 429 U.S. 66 (1976); *Zant v. Stephens*, 456 U.S. 410 (1982).

23. In *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), the Circuit Court had expressly stated that it could not determine the state law from reported (Cont'd)

The Eleventh Circuit did not abuse its discretion in deciding these issues, and certiorari should not be granted. In addition to there being no reason to certify to the Florida Supreme Court the issues raised by Mercedes, the prior history of this case establishes that the Florida Supreme Court would not consider these issues by certification. Mercedes attempted to obtain Supreme Court review of the majority of these issues when it lost in the Florida District Court of Appeals, but the Florida Supreme Court denied certiorari. *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So. 2d 620 (Fla. 1st Dist. Ct. App. 1990), *reh. denied*, 574 So. 2d 142 (Fla. 1990).

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cases. Even then, the Court did not certify the issue, but merely remanded for a review of whether the issue should be certified. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968) did not even involve certification. The Court merely abstained from making a momentous decision striking down a state statute based on state constitutional law.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by Petitioner, Mercedes-Benz of North America, Inc. should be **denied.**

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM ELEVENTH CIRCUIT BRIEF

* * *

2. *Statement of Facts.*

a. *Identification of parties.*

DEALER was an automobile dealer located in Daytona Beach, Florida which sold and serviced motor vehicles from a common facility under franchise agreements with Pontiac, GMC Truck, Alfa Romeo, and MBNA. [R23-41, L. 5-17]. Initially, a majority share of the stock in the DEALER corporation was owned by one Jerome Ginsburg, and a minority share of the stock was owned by one Mike Smith. [R25-57, L. 18 - R25-58, L.3]. MBNA is a licensee authorized to import and market Mercedes-Benz automobiles in the State of Florida pursuant to Chapter 320, Florida Statutes. TAYLOR is an automobile dealer doing business in Daytona Beach, Florida. FEDERAL INSURANCE COMPANY is an insurance company doing business in the State of Florida.

b. *Termination of Mike Smith's employment.*[2]

DEALER employed Mike Smith as dealer-operator. [R25-37, L. 23-25]. A "dealer-operator" is the person responsible for day-to-day operation of a dealership. [R25-38, L. 24 - R25-39, L. 4].

In early 1985, MBNA accused Smith of submitting false

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2. Facts preceeding MBNA's wrongful rejection of the transfer to TAYLOR in August, 1987, are set forth herein only because the trial court's ruling allowed MBNA to assert defenses barred by the Florida court decisions.

sales reports to MBNA [R25-93, L. 24 - R25-94, L. 4; DEALER's Ex. 8] and of failing to perform under its Franchise Agreement by omitting to make required improvements to the dealership facilities. [R25-105, L. 17 - R25-106, L. 4; DEALER's Ex. 11, p. 1-2]. As a result of these accusations against Smith and a review of the business records, in May, 1985, Ginsburg became convinced that Smith was mismanaging the dealership. [R25-109, L. 13 - R25-118, L. 2]. Smith and Ginsburg entered into an agreement whereby Smith agreed to correct his conduct. [R25-119, L. 17 - R25-120, L. 15; Def. Ex. 1019]. Shortly thereafter, however, Smith violated this agreement and GMAC threatened to terminate DEALER's floor-plan financing because Smith was out of trust. [R25-139, L. 16 - R25-142, L. 1]. Finally, in June, 1985, after Ginsburg confronted Smith with his failure to comply with the agreement and correct his conduct, the problem was resolved when Smith resigned as an officer and director, his employment was terminated, and he assigned his stock to Ginsburg. [R25-143, L. 1 - R25-145, L. 15].

Ginsburg immediately notified MBNA of Smith's termination, apologized for any misunderstanding resulting from Smith's conduct, and requested MBNA's assistance in finding a replacement. [DEALER's Ex. 13].

After Smith resigned, however, he met with the representatives of MBNA and the other franchisers. After this meeting, he told Ginsburg that DEALER could not fire him without the franchisers' consent. [R25-155, L. 7-24]. Smith then filed a lawsuit against DEALER, alleging wrongful termination of his employment. [R25-177, L. 22 - R25-178, L. 1].

In late 1985, the Circuit Court for Volusia County, Florida awarded to Mike Smith an injunction requiring that Mike Smith

be placed back in control of the dealership. [R25-178, L. 216]. Shortly thereafter, however, the Florida Fifth District Court of Appeal stayed the injunction, and in April, 1986, the Fifth District reversed the Circuit Court, holding that the franchise was solely the property of DEALER, that Mike Smith was at most an employee at will, and that his only rights against the DEALER corporation, if any, were merely for the recovery of damages. The Fifth District held that Smith was not entitled to the injunctive relief awarded by the Circuit Court. [R25-178, L. 24 - R25-182, L. 1; DEALER's Ex. 30].

c. *MBNA's attempt to terminate DEALER's franchise.*

On October 23, 1985, MBNA notified DEALER of its intent to terminate the Franchise Agreement, based upon (1) the claim that Smith had submitted false sales reports, (2) the claim that Smith had violated the Franchise Agreement, (3) a claim that DEALER had violated MBNA's rights by terminating Smith in June of 1985 without MBNA's prior consent, (4) the claim that notwithstanding Smith's termination in June 1985, there existed a dispute between the owners or operators of DEALER which had been continuing for more than 90 days, and (5) a claim that DEALER's principals (Ginsburg and Smith) had misrepresented on the dealership application the ownership of Smith's stock in the DEALER corporation. [DEALER's Ex. 25].

In January, 1986, in accordance with Florida law, DEALER filed with the Florida Department of Highway Safety and Motor Vehicles ("DMV") a complaint objecting to the attempted termination. [DEALER's Ex. 29]. As a matter of law, this filing operated to continue the Franchise Agreement in effect according to its terms, pending resolution of the termination dispute. See § 320.641(3), Fla. Stat. (1985).

Appendix A

d. *DEALER's first attempt to sell the dealership.*

John Radey, who was then DEALER's attorney, advised Ginsburg that under Florida statutory and case law, sales of franchises are favored over termination as a means of resolving disputes between a manufacturer and dealer (even when there are valid reasons for termination) since the sale renders the dispute moot and avoids a potential forfeiture by the dealer. [R24-201, L. 16 - R24-202, L. 16]. Radey also advised DEALER that under Florida law, DEALER could transfer the franchise at any time prior to the franchise being terminated by a final order of the DMV. Radey based his advice on the Florida statutes and a reported opinion, *Mercedes-Benz of North America. Inc. v. Department of Motor Vehicles,* 455 So.2d 404 (Fla. 2d DCA 1984), *rev. den.* 462 So.2d 1107 (Fla. 1985). [R24-200, L. 13 - R24-203]. Radey explained that in that case, the Florida Second District Court of Appeal ruled that under Florida public policy, the only basis for a manufacturer rejection of a proposed transfer is the qualifications of the transferee. [R24211, L. 7-22].

Based on Radey's advice, in October, 1986, DEALER proposed to sell the dealership to one Ronald Cutler, conditioned on approval by all of DEALER's franchisers. [R24-212, L. 13-19]. Although MBNA objected, all of the other manufacturers approved. [R34-34, L. 18-22]. Pontiac and GMC initially objected under § 320.643, Fla. Stat. (1985), on the grounds that Smith claimed an interest in the dealership. The DMV dismissed the objection because it did not relate to Cutler's qualifications, the only available issue in a transfer proceeding under § 320.643, Fla. Stat. (1985). [R24-241, L. 19 - R24-244, L. 14]. Pontiac and GMC then approved the transfer. [R24-244, L. 17-19].

MBNA also filed an administrative complaint objecting to

the proposed transfer under § 320.643, Fla. Stat. (1985). [DEALER's Ex. 46]. MBNA's complaint to challenge the transfer to Cutler was filed with the wrong agency, the Division of Administrative Hearings ("DOAH") rather than the DMV. [R24-216, L. 13 - R24-217, L. 6]. Thus, the case was ultimately closed by the DOAH for lack of jurisdiction in August, 1987. [R24-241, L. 16-18; DEALER's Ex. 88].

Despite this, MBNA refused to accept Cutler until Cutler agreed to accept certain conditions which MBNA had no right to impose, including a promise to build a new separate facility for the MBNA dealership. [R34-51, L. 7-19; Def. Ex. 494, portion marked "Dealer Operating Requirements Agreement", "General" provisions, par. H., which lists as a requirement, "Provide proposed plans for an exclusive M-B dealership."]. After Cutler purportedly agreed to these conditions, MBNA finally approved the proposed transfer on April 28, 1987 [R29-311, L. 7-12], notwithstanding the pending termination proceedings or Mike Smith's claimed ownership interest, and DEALER was so notified on May 1, 1987. [DEALER's Ex. 62]. MBNA executed a franchise agreement with Cutler without DEALER's knowledge or consent, even though Cutler had not closed his purchase contract with DEALER or paid DEALER the purchase price. [Def. Ex. 494; R34-52, L. 19-24].

e. *Entry of Recommended Order.*

Shortly after MBNA approved Cutler, the DOAH hearing officer in the termination dispute entered a Recommended Order which had no legal effect unless and until it was adopted by the DMV. [R24-231, L. 23 - R24-232, L. 19; Def. Ex. 432; R34-56, L. 5-22]. Under the Recommended Order, the hearing officer found that Smith had made errors in reporting sales, but that these errors

did not warrant termination of the Franchise Agreement. [R34-93, L. 1-16; Def. Ex. 432, p. 45, ¶ 23]. The hearing officer found that DEALER had not violated the provisions of the Franchise Agreement requiring improvements to the facility (even under MBNA's interpretation of the Franchise Agreement because, among other things, the time for performance had not passed at the time MBNA notified DEALER of its intent to terminate). [Def. Ex. 432, p. 45-46, ¶ 25]. The hearing officer found that Smith did own his stock at the time of application and approval, and that Ginsburg and Smith had not misrepresented the ownership of the stock. [Def. Ex. 432, p. 51-53, ¶ 39-41]. The hearing officer found that although Smith's employment was terminated without MBNA's approval in June of 1985, Florida law invalidated the provision of the Franchise Agreement requiring MBNA's approval. [Def. Ex. 432, p. 48, ¶ 29].

The Recommended Order ruled against MBNA on all of its grounds for termination of the franchise, except one — the hearing officer found that on October 23, 1985, there existed an internal dispute between Ginsburg and Smith which was grounds for termination under the Franchise Agreement. [R34-98, L. 22 - R34-99, L. 9; R24-236, L. 12-16; MBNA's Ex. 432, p. 49, ¶ 31-32]. Radey filed pleadings with the DMV asserting that the conclusion of law was in error because the hearing officer's finding that there was an internal dispute between the owners or operators of DEALER was inconsistent with the hearing officer's finding of fact that Smith was no longer an owner or operator of DEALER due to his termination in June, 1985, four months before the attempted termination. [R34-100, L. 15-R34-101, L. 7]. The Recommended Order was never adopted by the DMV, and therefore, never had any adjudicative effect. [R34-101, L. 8-11].

Appendix A

f. *DEALER's second attempt to sell the dealership.*

In June, 1987, Cutler defaulted on his contract and refused to close. [R25-63, L. 1-3]. DEALER notified MBNA of Cutler's default, and on June 26, 1987, DEALER entered into a new contract to sell the dealerships to TAYLOR. [R23-27, L. 22-R23-28, L. 1; DEALER's Ex. 70, 71, 72, & 73]. On July 8, 1987, MBNA notified DEALER in writing that it would no longer consider the Cutler transaction, and that instead, it would consider only the TAYLOR transaction. [DEALER's Ex. 74].

Cutler filed suit against DEALER in the Circuit Court for Volusia County, Florida, seeking both an injunction preventing the sale and the recovery of his deposit. [R34-105, L. 23-24; Def. Ex. 364]. Cutler also moved the DOAH for the entry of an injunction to preclude MBNA from considering TAYLOR's application in MBNA's still pending proceeding objecting to the Cutler transfer under § 320.643, Fla. Stat. (1985). [R34-106, L. 12-14]. MBNA opposed Cutler's motion for an injunction based on the fact that a transfer proceeding is based solely on the issue of the qualifications of the transferee and cannot be used to resolve other issues. [DEALER's Ex. 97]. The DOAH denied Cutler's motion for an injunction. [R34107, L. 3-6]. The Florida Circuit Court also denied Cutler an injunction and directed the TAYLOR closing to proceed. [R34-107, L. 6-8; R34-106, L. 3-7].

MBNA had no lawful basis under Florida law for objecting to the proposed transfer to TAYLOR since MBNA conceded that TAYLOR was qualified. [R29-300, L. 5-7]. All of the other three franchisers approved the sale to Taylor. [R24-249, L. 21 - R24-250, L. 1]. Even so, MBNA refused to approve the transfer, and on August 28, 1987, MBNA filed under the same § 320.643, Fla. Stat. (1985), a complaint with the DMV against DEALER,

objecting to the proposed transfer, and joining Cutler, Smith, and TAYLOR as parties. [DEALER's Ex. 93].

MBNA's complaint did not allege that TAYLOR was unqualified, as required by § 320.643, Fla. Stat. (1985). [R24-251, L. 9-18]. The only ground cited by MBNA for its objection was that it did not know who had a right to control the franchise because Smith and Cutler allegedly claimed an interest in the franchise, and Smith years earlier, had threatened to sue MBNA if it approved a transfer of the franchise. [DEALER's Ex. 93]. This was not a legal or permitted basis for objecting to the transfer under § 320.643, Fla. Stat. (1985), as had already been determined when GM objected to the Cutler transfer on the basis [R24-241, L. 19 - R24-244, L. 14], as MBNA had acknowledged in its response to Cutler's motion for an injunction [DEALER's Ex. 97], and as was later held by the DMV and the Florida Appeals Court [DEALER's Exs. 121 & 182].

DEALER's contract with TAYLOR involved the sale of all four franchises as well as the real property upon which the dealerships were located. [R34-66, L. 1-8; DEALER's Exs. 70, 71 & 72]. MBNA's objections were expected to be expeditiously resolved in view of the prior similar determinations. [R34-129, L. 12-14]. Therefore, upon MBNA's refusal to approve the transfer, the contract was rewritten so that the other three franchises and the land, together with the dealership's facilities, could be sold separately, and so the Mercedes-Benz "franchise rights" only could be sold in a later, separate closing. [R23-67, L. 11-23; DEALER's Ex. 115]. MBNA was notified prior to this occurrence and advised this was being done to mitigate damages. [DEALER's Exs. 116 & 117].

TAYLOR closed on the purchase of the other three

franchises and the sales and service facilities on October 28, 1987. [R34124, L. 15-21]. In order to permit DEALER to continue operating the Mercedes-Benz dealership pending resolution of the dispute with MBNA, DEALER moved the dealership to an adjoining vacant lot which it leased from TAYLOR [R34-126, L. 22 - R34-128, L. 1], as DEALER had advised MBNA it was going to do [DEALER's Ex. 119, 1st partial paragraph]. This temporary arrangement was agreed upon by TAYLOR and DEALER in the belief that this arrangement would avoid additional damages that would result from DEALER incurring lease obligations, making capital improvements on non-owned property, and incurring moving expenses. [R34-129, L. 11-23]. MBNA refused to accept the allegedly "new" location of the dealership contiguous to the prior sales and service facilities, and continued to send mail to the previous location, and list DEALER in its dealership directory at its prior address. [R34-138, L. 13 - R34-139, L. 24].

On November 9, 1987, as expected by DEALER, the DMV dismissed MBNA's complaint. [DEALER's Ex. 121]. In doing so, the DMV confirmed its prior rulings and stated that **"The Complaint contained no allegation that the proposed transferees were not persons qualified to be transferees under 320.643, Florida Statutes,"** and **"Because the Complaint does not raise the issues permitted to be raised by the § 320.643, it cannot be considered a complaint as contemplated by the statute."** [DEALER's Ex. 121, p. 1, ¶ 3; p. 2, ¶ 6]. The DMV declared MBNA's termination action against DEALER moot because TAYLOR was to be the new franchisee by operation of law.

Despite the dismissal of its complaint by the DMV and approval of TAYLOR, MBNA continued to refuse to approve or

honor the legally recognized transfer from DEALER to TAYLOR, thus preventing the closing. [R34-133, L. 23 - R34-134, L. 1]. Even though both Cutler and Smith were joined as parties in the administrative proceeding, were now bound by the DMV's orders, took no appeal, and sought no stay, MBNA alone continued to refuse to approve the transfer on the grounds that Cutler and Smith might have a right to prevent the transfer to TAYLOR, despite the DMV's ruling that this was not a proper objection. [R34-132, L. 16 - R34-134, L. 1; DEALER's Ex. 182, p. 10].

MBNA appealed the DMV order to the First District Court of Appeal for the State of Florida, claiming that Cutler and Smith claimed an interest in the franchise which justified MBNA's refusal to approve the transfer. [DEALER's Ex. 126; DEALER's Ex. 182, p. 10]. In the summer of 1988, DEALER commenced a lawsuit to enforce the DMV order. [R34-135, L. 22-24]. Before the order could be enforced, MBNA obtained a stay of the order from the DMV by posting a bond executed by MBNA, as principal, and FEDERAL, as surety. [DEALER's Ex. 137].

In November, 1988, all of the Cutler litigation against DEALER was settled. [DEALER's Ex. 141]. Cutler gave up his claim to his deposit (in the amount of $425,000 [R27-32, L. 10-15]), and paid even more money ($37,500 [R26-341, L. 18-21]) to cover DEALER's legal fees. [R34-150, L. 5-8]. Additionally, Cutler provided a letter informing MBNA that he had no objection to the transfer to TAYLOR. [DEALER's Ex. 141]. Cutler dismissed his lawsuit against DEALER with prejudice. [R24-310, L. 17-25].

In April, 1989, shortly before the TAYLOR contract was then scheduled to expire, DEALER settled with Smith and Smith

provided an affidavit reciting that he had no objection to the transfer to TAYLOR. [DEALER's Ex. 145]. Pursuant to the Settlement Agreement, Smith's lawsuit was dismissed with prejudice. [Def. Ex. 1017, p. 2, ¶ 4]. Even after being notified of these settlements, MBNA continued to refuse to approve the TAYLOR transfer, and MBNA's attorney sent Radey a letter in May 1989 inquiring why DEALER thought these settlements would affect MBNA's position. [DEALER's Ex. 146].

The Florida First District Court of Appeal affirmed the DMV's order on May 3, 1990. [DEALER's Ex. 182]. In so doing, the court stated that:

> **MBNA's complaint was silent as to the qualifications of the Taylor transferees. In fact, the only basis for MBNA's complaint was its fear that Cutler, the first-proposed transferee, would successfully force a transfer under the original transfer agreement. Since this is not a proper basis for a transfer challenge, the Department correctly dismissed the complaint.** [DEALER's Ex. 182, p. 10].

MBNA sought review by the Florida Supreme Court. It was ultimately denied on October 18, 1990 [DEALER's Ex. 191], over three years after the TAYLOR closing was originally to occur under the contract, but for MBNA's conduct. [R23-72, L. 23 - R23-73, L. 9]. On May 1, 1990, however, despite several contract extensions, DEALER's contract with TAYLOR expired and TAYLOR refused to further extend the closing date due to changing market conditions, economic climate and the unavailability of financing. [DEALER's Ex. 185; R23-80, L.

9-22; R23-98, L. 15-24]. DEALER brought the present action against MBNA and FEDERAL for its resulting damages.

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No. 95-590

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Petitioner,

v.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC., AND BILLY GRUBBS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents cannot seriously dispute that Mercedes' conduct in this case was at the core of the First Amendment right protected by the *Noerr-Pennington* doctrine: petitioning an administrative agency for an interpretation and enforcement of the law. Faced with competing claims to its automobile dealership, Mercedes chose — reasonably and in good faith — to seek an adjudication of its legal rights and obligations before the Florida DMV to resolve the ownership dispute. The only alternative for Mercedes was to allow the *automatic* transfer of the dealership under Florida law to Taylor, which might very well have been unlawful because of the competing interests of Smith and Cutler.

Solely because Mercedes filed a state administrative complaint, however, a divided panel of the Eleventh Circuit held — over a properly raised *Noerr-Pennington* defense — that Mercedes is liable for more than ***$15 million*** in damages. Contrary to respondents' suggestions, Mercedes engaged in no "improper[] obstruct[ion]" (MSP Br. 1) or any other "refusal to recognize" the transfer to Taylor (Taylor Br. 11) — apart from the filing of a DMV complaint. And, as Mercedes has demonstrated (Pet. 16-17), at the time it filed its DMV complaint the law was unclear whether the Automobile Dealer's Act allowed an objection to a dealership transfer for reasons other than the transferee's "qualifications." Mercedes' DMV complaint was no "sham" to disguise an effort to disrupt the dealership transfer to Taylor. The Eleventh Circuit expressly concluded that Mercedes filed its complaint to avoid "potential lawsuits brought by either Cutler or Smith." Pet. App. 6a.

The First Amendment and this Court's *Noerr-Pennington* doctrine will not permit a party to be penalized with a huge damages award merely because it sought, in good faith, a state administrative declaration of its legal obligations rather than acquiescing in a possibly illegal franchise transfer. Review by this Court is plainly warranted to correct this gross constitutional error and to clarify the scope of the *Noerr-Pennington* doctrine, which respondents do not dispute has been the subject of conflicting lower court decisions.

Moreover, despite Taylor's bald assertion to the contrary (Br. 21), it would not have been necessary to reach these important federal questions if the Eleventh Circuit had held, as Mercedes urged, that Taylor lacked standing to bring a claim under the Automobile Dealer's Act and that Mercedes had not "violated" that Act by filing a complaint with the DMV. Instead, the panel — over a dissent by Judge Hill — failed to certify these novel questions to the Florida Supreme Court and proceeded to decide them incorrectly. At the very

minimum, a remand to the Eleventh Circuit with instructions to certify these questions is necessary.

A. Mercedes Has Raised A Valid *Noerr-Pennington* Claim

Respondents have made a variety of procedural and substantive objections to Mercedes' First Amendment claim, none of which can withstand even minimal scrutiny.

1. As a threshold matter, MSP makes the halfhearted assertion that Mercedes somehow "waived" its *Noerr-Pennington* defense by failing to raise it properly in the courts below. MSP Br. 5. MSP acknowledges, however, that Mercedes presented its *Noerr-Pennington* claim in both the district court and the Eleventh Circuit. MSP Br. 5-6. For its part, Taylor makes no such assertion and concedes that Mercedes raised this claim in the Eleventh Circuit, which rejected it as "completely meritless." Taylor Br. 8.

In fact, Mercedes properly preserved its First Amendment defense in the courts below, raising it first in its answers to the MSP complaint and the Taylor counterclaim in the district court. R. 1-8; Pet. 10. On motions for partial summary judgment, the district court held that Mercedes' First Amendment claim was no defense to liability under Section 320.643. R. 29-405, R. 31-214. The issue was then fully briefed to the Eleventh Circuit, which (as Taylor concedes (Br. 8)) decided the issue on the merits.

2. Taylor argues without citation (at 6) that "basic principles of *res judicata*" somehow precluded Mercedes from raising its *Noerr-Pennington* defense in federal court because that defense was not raised during a prior appeal to the Florida District Court of Appeal of the DMV's dismissal of Mercedes' administrative complaint. But Mercedes had no reason to present a First Amendment issue in the state proceedings, and neither the DMV nor the court of appeal had any reason to adjudicate a *Noerr-Pennington* claim, because those proceedings did not involve a suit for damages. This damages action under Section 320.697 was filed by

respondents only *after* the DMV and the court of appeal had ruled on Mercedes' objections to the proposed transfer to Taylor.

3. Respondents attack the merits of Mercedes' *Noerr-Pennington* claim by asserting that it was not the act of filing an administrative complaint (*i.e.*, "petitioning" activity) that subjected Mercedes to massive damages liability, but rather some other "unlawful" "refusal to recognize the dealership transfer." Taylor Br. 11; see MSP Br. 17 (citing Mercedes' "actions in refusing to recognize the transfer"). Respondents, however, cannot point to any action by Mercedes other than its filing of a DMV complaint challenging the Taylor transfer. Indeed, Mercedes did nothing other than file a complaint with the DMV to resolve a complicated ownership dispute over its franchise. To achieve this goal, Mercedes joined all of the relevant parties to the proceedings — MSP, Taylor, Smith, and Cutler — so that the issue could be resolved once and for all in one forum. P. Ex. 93; R. 29-203, 29-208.

Even if it had wanted to do so, Mercedes could have done nothing to delay or obstruct the transfer other than file a DMV complaint. If Mercedes had not filed its complaint for a determination of the lawfulness of the transfer to Taylor, the transfer would have been effected automatically by operation of Section 320.643(2)(a),[1] thereby subjecting Mercedes to potential liability to either Smith or Cutler. As the Eleventh Circuit expressly found, Mercedes filed its complaint against the transfer "on the ground that by approving the transfer it would open itself up to potential lawsuits brought by either Cutler or Smith, each claiming to be the

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[1] After the DMV granted MSP's motion to dismiss Mercedes' complaint, the transfer of the dealership to Taylor "took place by operation of law." *Mercedes-Benz of North Am., Inc.* v. *Mike Smith Pontiac, GMC, Inc.*, 561 So.2d 620, 624 (Fla. Dist. Ct. App.), rev. denied, 574 So.2d 142 (Fla. 1990).

rightful dealer." Pet. App. 6a; see also *Mercedes-Benz*, 561 So.2d at 624.

Indeed, the Eleventh Circuit relied on the decision by the DMV rejecting Mercedes' complaint for lack of jurisdiction, and its affirmance on appeal, in holding that the issue whether Mercedes had "violated" Section 320.643 by filing a complaint was *res judicata*. Pet. App. 9a-12a. Thus, it is undisputed that the filing of Mercedes' administrative complaint was the *sole* basis for the court's liability holding.

In the final analysis, respondents engage in mere semantics by arguing that the damages in this case were based on Mercedes' "refusal" to approve a dealership transfer rather than on Mercedes' seeking administrative and judicial review. Under Florida law, the only way Mercedes could have avoided a transfer was by filing an administrative complaint to obtain a determination of its rights. That is the only basis for Mercedes' huge liability in this case, which (as we have shown (Pet. 13-17)) is repugnant to the First Amendment.

4. Respondents also repeatedly assert that Mercedes filed its administrative petition in bad faith, as a sham to obstruct the transfer of its dealership to Taylor. Thus, MSP states at the outset of its brief (at 1) that "Mercedes attempted to give excuse and cover its illegal actions by filing a complaint with the Florida [DMV]." See also Taylor Br. 11-12 (citing Mercedes' act of filing a "meaningless," "inoperative," and "legally useless" complaint). Respondents, of course, have the burden of proving that Mercedes' complaint was a "sham" (*Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1928 (1993)), and no court has yet so found.

Contrary to respondents' unsupported assertions, the record in this case is clear that Mercedes filed its DMV complaint in good faith because it was unsure whether Taylor was a bona fide transferee for purposes of Section 320.643 when neither Smith nor Cutler, who claimed interests in the

dealership, had consented to the transfer. The precise situation confronting Mercedes was not specifically addressed by Section 320.643 or any other section of the Automobile Dealer's Act.[2] Accordingly, Mercedes concluded that Florida law gave it no reasonable alternative but to file a complaint against the proposed MSP-Taylor transfer and join Smith and Cutler as parties to the proceeding so that all interested parties could assert their claims in one forum.

The DMV and the Florida District Court of Appeal subsequently held that the DMV had no jurisdiction to adjudicate Mercedes' action because its complaint did not challenge Taylor's moral character or business experience. Pet. 9-10. But the Florida appellate court did not cite any precedent for this holding and expressly noted that there may be other grounds for a challenge to a franchise transfer not enumerated in the statute. See 561 So.2d at 624; Pet. 10. Mercedes' DMV complaint was therefore not "objectively baseless," *Professional Real Estate Investors*, 113 S. Ct. at 1923, when it was filed.

In any event, the Eleventh Circuit expressly found that Mercedes filed its complaint only to protect itself from "lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer." Pet. App. 6a; see also *Mercedes-Benz*, 561 So.2d at 624.[3] Mercedes' administrative litigation was thus instituted entirely in good faith (hence the jury's decision not to award treble damages in this case), and respondents have offered no proof to the contrary.

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[2] Judge Hill in his dissent in this case described the statute as "obscure and unclear." Pet. App. 17a.

[3] MSP is clearly incorrect in its (literally) boldfaced assertion (at 7) that "[n]owhere did the Florida appeals court or the Eleventh Circuit make such a finding" on Mercedes' reason for filing a complaint with the DMV.

B. Respondents Do Not Seriously Dispute The Disarray In The Lower Courts On The Scope of The *Noerr-Pennington* Doctrine

The Eleventh Circuit treated Mercedes' First Amendment claim as "meritless" (Taylor Br. 8) in response to an argument by MSP that the *Noerr-Pennington* doctrine was inapplicable to this case. MSP now tries to suggest (at 4) that it never made that argument to the Eleventh Circuit and that Mercedes has "misinterpret[ed]" a "phrase" from a sentence in its brief. In fact, however, the entire sentence from the section of MSP's brief entitled "The Noerr-Pennington Doctrine Does Not Apply To This Case" reads: "This doctrine, however, applies only to litigation involving business relationships between competitors and anti-competitive activities covered under state and federal statutes." Answer and Reply Brief of the Appellant, Mike Smith Pontiac, GMC, Inc. 25-26. There can be no doubt about MSP's position on Mercedes' First Amendment defense.

Taylor tries to avoid the issue by suggesting that it (as opposed to MSP) "never argued to the court of appeals that the *Noerr-Pennington* doctrine was limited to antitrust cases" (Br. 10). Although that point is irrelevant in light of MSP's clear position below, Taylor then proceeds to make the very argument (at 14) that it claims to eschew: "the *Noerr-Pennington* doctrine is not implicated by petitioning activities which are 'more economic than political in nature.'" Indeed, Taylor quotes from an Eleventh Circuit case, *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991), that convincingly demonstrates the cramped view of the *Noerr-Pennington* doctrine in that circuit and the confusion in the lower courts over this issue.

In *Todorov*, the court described the *Noerr-Pennington* doctrine only as "immuniz[ing] from antitrust liability anticompetitive activity that consists of petitioning a governmental agency to obtain favorable legislation." 921 F.2d at 1446 n.14. The court refused to apply the doctrine to

lobbying activities by physicians seeking to prevent a colleague from receiving radiology privileges at a hospital, finding those actions "more economic than political in nature." *Ibid.*

The decision by the Eleventh Circuit in *Todorov*, which it followed in this case, conflicts directly with this Court's admonition in *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511 (1973), that the First Amendment right recognized by the *Noerr-Pennington* doctrine allows a party to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." Indeed, the First Amendment right to petition government agencies for redress encompasses the institution of litigation that seriously affects substantive (and legally protected) economic interests of other parties. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 742-743 (1983).

Unlike the Eleventh Circuit here and in *Todorov*, several other circuits have applied the *Noerr-Pennington* doctrine outside of the antitrust context to "reject[] claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action." *Brownsville Golden Age Nursing Home, Inc.* v. *Wells*, 839 F.2d 155, 160 (3d Cir. 1988); see, *e.g.*, *Havoco of Am., Ltd.* v. *Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983) (defendants prompted SEC investigation); *Suburban Restoration Co.* v. *ACMAT Corp.*, 700 F.2d 98, 102 (2d Cir. 1983) (defendant sought injunction against award of public contract).

As we have demonstrated (Pet. 17-21), many lower courts have struggled to define the scope of the First Amendment protection extended by the *Noerr-Pennington* doctrine. See *Whelan* v. *Abell*, 48 F.3d 1247, 1253-1254 (D.C. Cir. 1995) (noting tension in the case law but declining to "set forth any kind of encyclopedic position on the relation

between the common law torts at issue here and the *Noerr-Pennington* doctrine — or between them and the First Amendment regardless of the idiosyncracies of *Noerr-Pennington*"). This case presents this Court with an opportunity to resolve the conflicts and confusion in the lower courts on this important issue.

Tellingly, respondents do not seriously dispute the conflict in the lower courts on the scope of the *Noerr-Pennington* doctrine. Instead, they argue that review should not be granted in *this* case because the Eleventh Circuit did not discuss the *Noerr-Pennington* issue in rejecting Mercedes' claim. Taylor Br. 10; MSP Br. 3-7. But the court below needed little discussion in light of the arguments presented by respondents and its prior ruling in *Todorov*. Thus, there clearly is a circuit conflict presented by this case: Mercedes properly raised the *Noerr-Pennington* issue, the Eleventh Circuit rejected it, and other circuits would have accepted it. Particularly given the magnitude of the penalty imposed on Mercedes for exercising its First Amendment rights, review by this Court is necessary and appropriate.

C. Certification Is Necessary To Answer Important Questions Of State Law Correctly

Respondents object to certification of the important state law issues presented in this case because Mercedes did not request certification in the Eleventh Circuit. But the same objection could have been made in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974), where the Court ordered certification even though it was not requested by the parties. Moreover, there was no need for Mercedes to raise the issue for the first time in a rehearing petition because Judge Hill had already urged that the state law questions be certified and Judges Burkett and Black had refused to do so.

The state law issues that should be certified — including whether Taylor has standing to bring a claim under the Automobile Dealer's Act and whether Mercedes "violated"

that Act by filing a complaint with the DMV (Pet. App. 16a) — would, if decided in Mercedes' favor, eliminate the need to decide the significant federal constitutional issues raised by this case. The state law issues were not irrelevant to the federal issues (as Taylor tries to suggest (at 21)) and had not previously been decided by any Florida court (as MSP implies (at 24)).

As Judge Hill stated in dissent, these issues of Florida law are "important," "heretofore undecided," and dispositive (Pet. App. 16a). He therefore believed that the Florida Supreme Court should render "the first interpretation of the questions raised by th[e] relatively obscure and unclear statute" involved in this case. *Id.* at 17a. Only that court can issue a "decisive and authoritative [interpretation], one on which the people of Florida can rely." *Ibid.* And it is the people of Florida who will be affected immediately by this decision, which will have dramatic consequences for the motor vehicle industry in the State — consequences that likely were *not* intended by the Florida legislature and that likely would *not* have been accepted by Florida's highest court. See *id.* 16a-17a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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